JD(NY)-40-09
Bronx, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

KINGSBRIDGE HEIGHTS REHABILITATION AND CARE CENTER

and

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

CASE NOS. 2-CA-38418
2-CA-38621
2-CA-38628
2-CA-38632
2-CA-38636
2-CA-38688
2-CA-38708

Nancy A. Slahetka, Esq., Colleen Breslin, Esq., and Nicole Buffalano, Esq., **for the General Counsel**
Hanan B. Kolko, Esq., and Melissa Woods, Esq., (Meyer Suozzi, English and Klein, P.C.), **of New York, New York, for the Charging Party Union**
John T. McCann, Esq., and Lindsey H. Hazelton, Esq., (Hancock & Estabrook. LLP), **of Syracuse, New York, for the Respondent**

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York, on 12 days between November 17, 2008 and January 8, 2009. The Complaint alleges that Respondent engaged in various violations of Section 8 (a)(1), (3) and (5) of the Act. The Respondent denies that it has violated the Act.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by Counsel for the General Counsel on May 14, 2009, I make the following[2]

[1] Respondent's Amended Answer asserts that the complaint is barred by the statute of limitations. Respondent did not pursue this defense and I find no support for it in the record.

[2] The record is hereby corrected so that at page 1361, line 16 and thereafter, the word "horlott" should be spelled "harlot", except where the witness spells the word on the record; on page 968, line 10 the last word should be "things".

Findings of Fact

I. Jurisdiction

The Respondent, a New York corporation with an office and place of business located at 3400-26 Cannon Place, Bronx, New York, is engaged in the operation of a nursing home. Annually, Respondent derives gross revenues in excess of $100,000, and purchases and receives at its facility in the Bronx products and goods valued in excess of $5,000 from other enterprises located within the State of New York, each of which enterprises receives these products and goods directly from points outside the State of New York. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that 1199 SEIU, United Healthcare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Undisputed Matters

For a number of years the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following unit:

> All regular full and part-time employees including recreation employees and employees in the following classifications: certified nursing aide, dietary aide, laundry aide, housekeeping aide, maid, porter, head porter, housekeeper, gardener, fireman, handyman, maintenance, painter, window cleaner, engineer (licensed), kitchen aide, dishwasher, second cook, first cook, assistant chef, chef, telephone operator, receptionist, clerk, assistant dietician, dietician, recreation worker and aide, social worker aide, and social worker assistant, as supplemented by custom, usage and practice. Excluding professional, confidential employees and supervisory employees.

Respondent and the Union have been parties to successive collective-bargaining agreements. Pursuant to a Board Order, described below, Respondent was bound by the October 1, 2002 - April 30, 2005 contract between 1199 SEIU and the Greater New York Health Care Facilities Association, Inc., for a Paraprofessional Unit.

Pursuant to Article 23 of the 2002-2005 collective-bargaining agreement Respondent is required to make monthly contributions to the 1199/SEIU Greater New York Benefit Fund. The Greater New York Fund is comprised of six funds described as the Benefit Fund (Health Care), the Child Care Fund, the Pension Fund, the Job Security Fund, the Education Fund and the Workers Participation Fund.

The parties agree that Helen Sieger is the Facility Operator of Respondent and that Jacob Perles is the Administrator of Respondent, and that Sieger and Perles are supervisors and agents of Respondent.[3] Sieger is the sole owner of Respondent. Respondent admits that the persons listed below held the positions described below and that they were supervisors for purposes of this proceeding:

Gregory Korzeb	Assistant Administrator
Loida Chua	Executive Director of Nursing

[3] Perles had left the facility by the time he testified herein.

Penn Guererro	Nursing Director
Roselyn Sacramed	Assistant Director of Nursing
Tony Szereszewski	Director of Housekeeping
Irena Volinsky	Director of Activities
Jan Dziekonski	Director of Dietary

B. Prior Related Cases

Resort Nursing Home and Kingsbridge Heights Rehabilitation Care Center, 340 NLRB 650 (2003), enfd 389 F.3d 1262 (D.C. Cir 2005), describes Respondent Kingsbridge's unsuccessful efforts to withdraw from the Greater New York Healthcare Facilities Association, Inc., the multi-employer association to which it had belonged for a number of years.[4] The collective-bargaining agreement in effect between the Association and the Union had a term from October 1, 1997 to September 23, 2002. Fearing a decline in State aid in the aftermath of September 11, 2001, the Association and the Union entered into negotiations and in February 2002 they executed a memorandum of agreement which fixed the terms of a new contract for 2002 through April 30, 2005. The Board affirmed Administrative Law Judge Raymond Green's finding that Kingsbridge was bound by the terms of the 2002-2005 collective-bargaining agreement. Respondent was ordered to execute the contract and abide by its terms, including the payment of wages and contributions to the various employee benefit funds, and to make the employees whole for its failure to make required payments.

In *Kingsbridge Heights Rehabilitation Care Center*, 352 NLRB 6 (2008), the Board affirmed Judge Mindy Landow's finding that Kingsbridge unlawfully and without proper justification videotaped its employees who engaged in informational picketing and unlawfully threatened to delay the reinstatement of employees after they engaged in a strike. Kingsbridge was ordered to cease surveilling its employees' union activities with video cameras and to cease threatening to delay the reinstatement of employees if they engage in a strike and make an unconditional offer to return to work. Judge Landow described the background of the case before her as follows: Beginning in June 2005 Kingsbridge had failed to make timely or complete payments to the employee benefit funds. The Union filed an unfair labor practice charge on December 6, 2005.[5] On January 1, 2006 Respondent's employees were notified that their hospital, health, drug, dental and other benefits would terminate as a result of Kingsbridge's delinquencies. The Union gave notice that the employees would engage in informational picketing on March 15. The employees also voted to strike in mid-May 2006. Respondent videotaped the March 15 picketing by employees. Judge Landow found no evidence that the Union or the employees had engaged in any misconduct justifying the videotaping of picketing employees. In the event, no strike took place. However, Judge Landow found that Respondent unlawfully told its employees that if they went out on strike for three days they could not return to work for the next three weeks. When this was communicated to the employees the Respondent had no contractual arrangements that required it to keep replacement employees on the payroll for three weeks.

The unfair labor practice charge relating to the failure to make timely or complete payments to the employee benefit funds led to the issuance of a Complaint on May 1, 2006. The hearing in that case opened before Administrative Law Judge Steven Fish; the parties reached a settlement on June 8 and the case was closed on June 26, 2006. After certain

[4] Resort is not involved in the instant proceeding. It shared common ownership with Respondent when the Board's Decision issued.

[5] The settlement of this case and its subsequent reopening are described below.

payments were made to the funds the employees' benefits were resumed, including the health coverage. This was not the end of the matter as will be seen from the summary of the next Board Decision to deal with this employer. That Board Decision came about after Judge Fish issued an Order reopening the hearing before him on December 12, 2007 based on allegations that Respondent had violated the Settlement Agreement.

On December 24, 2008 the Board issued its Decision in *Kingsbridge Heights Rehabilitation and Care Center,* 353 NLRB No. 69 (2008). The Board affirmed the finding by Judge Fish that Respondent had violated the Settlement Agreement dated June 8, 2006 requiring it to make back payments to the funds and requiring it to continue transmitting timely monthly payments to the funds. The lump sums required by the Settlement Agreement had been paid but the Respondent had resumed its practice of making late payments. Judge Fish's Decision, issued on July 30, 2008 found that Respondent had failed to make timely payment to the Funds since June 2005, had failed to make any contributions to the Funds for various months and had made no payments to any of the funds since an August 2007 payment to be credited against the amounts due for May 2007.

Judge Fish's Decision described a meeting held on February 22, 2006 after the employees' medical benefits had been suspended. Among those present were Facility Operator Helen Sieger and her attorney Joel Cohen, and Union Executive Vice President Jay Sackman with Union attorney Irwin Bluestein. Cohen pointed out that Respondent had been slow in making payments for many years and asked why Respondent was being picketed while other employers who were more in arrears were not subject to picketing. Sackman replied that the funds were trying to tighten up their collection efforts. Sackman also asserted that the Union had no alternative but to picket Kingsbridge. Unlike the other facilities Kingsbridge had not signed a contract with the Union and there was no arbitration mechanism in place to deal with the failure to remit contributions to the employee benefit funds. Cohen offered the Union an interim contract dealing with health benefits but the Union rejected this stating that it wanted to reach agreement on a full contract.[6]

Judge Fish's Decision, affirmed by the Board, concluded that

> A Union is not obligated to treat every Employer in the same manner, with respect to negotiations, positions taken, or when and if to cut off benefits. Here [the Union] was and is dealing with an Employer that has committed two prior unfair labor practices, including the failure to sign a contract…. Further the Union had been forced to go to arbitration to enforce Respondent's obligation to make payments under the 2002-2005 agreement.
>
> [I]n view of Respondent's past conduct, I find that it was reasonable and clearly lawful, for the Union to insist that Respondent make all prior payments in order to forestall cutting off benefits, and for the Union to insist on Respondent signing a contract, rather than an interim agreement, as suggested by Cohen. I find nothing improper or illegal in the Union using the "leverage" of cutting off benefits, to persuade Respondent to sign a full contract. This position is certainly within the realm of the Union's right to make reasonable judgments as to what it believes is in the best interest of its membership.

[6] Judge Fish noted that the two issues precluding a collective-bargaining agreement were Respondent's desire to cease contributions to the Child Care Fund and the identity of the contract arbitrator.

Judge Fish discussed a letter sent by Cohen to Union Attorney Hanan Kolko on August 27, 2007. In this letter Cohen stated that Kingsbridge "wishes to negotiate a change in how it makes payments to the 1199 Fringe Benefits Funds. Kingsbridge proposes that it be given up to 7 months to make payments to the various Funds without being considered in arrears." In furtherance of the proposal, Cohen asked the Union for dates to conduct negotiations. The Union did not respond to the letter and there were no negotiations on Respondent's request for a change in the timing of its obligations to the Benefit Funds. Respondent relied upon this letter in the case before Judge Fish to argue that the Union had refused to bargain over a mandatory subject of bargaining. Respondent thereby claimed the right "to unilaterally change the terms of the collective-bargaining agreement as it relates to when Fund payments must be made."

Judge Fish, affirmed by the Board, rejected this defense to the unilateral changes in payments to the Fund. The defense was based on an exception to the rule that unilateral changes may not be made without first bargaining to impasse in cases where the employer has diligently sought bargaining and the Union has avoided bargaining. The decision noted that Respondent's request to bargain was made in the context of its unfair labor practices committed continuously for over a year. Further, the unilateral changes made by Respondent were not consistent with the proposal to make payments up to 7 months after they were due since Respondent had been making no payments at all to the Funds.

C. Events Preliminary to the Instant Case

On October 3, 2007 the Funds gave notice that they would terminate benefits to the employees as a result of Respondent's failure to make contributions for amounts due after May 2007. The benefits ceased to be provided to the unit employees on November 3, 2007. The unit employees voted to strike in October 2007 and commenced a strike on February 20, 2008.[7] These events will be discussed in detail below.

Beginning on August 23, 2007 and on various dates through June 26, 2008, the Union filed numerous unfair labor practice charges and amended charges against Respondent. The instant Consolidated Complaint and Notice of Hearing issued on May 30, 2008, to be followed by an Order Further Consolidating Cases and Amended Consolidated Complaint on October 16, 2008. The Complaint was further amended during the hearing to add additional dates to some of the original allegations.

The unfair labor practices alleged in the instant Consolidated Complaint include failing to make payments to the employee benefit Funds, creating the impression of surveillance of employees' Union activity, engaging in surveillance of Union activity, threatening to refuse to timely reinstate strikers, bypassing the Union, offering employees a yellow dog contract, offering employees payments for medical bills, failing to provide the Union with reasonable access, failing to provide information to the Union, giving cash payments to employees, threatening employees with discharge, deportation and unspecified reprisals for engaging in Union activity, instructing employees not to picket on behalf of the Union, interrogating employees about protected concerted activities, denying Union representation to employees, disparately applying rules regarding harassment, searching employees' property, discriminatorily suspending and discharging employees, refusing to execute a collective-bargaining agreement, refusing to meet with the Union and making regressive bargaining proposals.

[7] Apparently some employees resigned from the Union and did not join the strike.

On July 23, 2008 the Regional Director of Region 2 of the NLRB commenced an action pursuant to Section 10(j) seeking an injunction pending the disposition of the instant case. United States District Court Judge Denise Cote issued an Opinion and Order granting the injunction on August 14, 2008.[8] Judge Cote's Order enjoined the unfair labor practices alleged by the Regional Director and ordered Respondent to take certain actions. Judge Cote ordered Respondent to treat the striking employees as unfair labor practice strikers and, upon their unconditional offer to return to work, reinstate them to their former positions.[9] Respondent was also ordered to rescind changes in terms and conditions of employment, including "resuming making timely benefit fund contributions on behalf of employees, upon their unconditional offer to return to work." Respondent was ordered to permit Union access in accordance with the collective-bargaining agreement.

Pursuant to Judge Cote's Order dated August 20, the striking employees were reinstated as of August 21, 2008. It is undisputed that Respondent resumed making payments to the Funds on September 10, 2008.

D. Facts Relating to the Instant Case

1. Union Access

Article 6 of the 2002-2005 collective-bargaining agreement provides for Union access:

> A. Visitation: The representative of the Union servicing the facility, or the Union's designee, shall have admission to all properties covered by this Agreement to discharge his or her duties as representative of the Union.

Article 9 of the agreement provides a grievance procedure culminating in arbitration. Martin Scheinman is named as the Impartial Chairman to issue binding arbitration awards concerning interpretation or application of any clause of the agreement.

On May 26, 2005 Scheinman issued an award setting forth principles for the Union's access to the facility. The relevant portions of the award are as follows:

> It is fundamental Union Officials have the right to visit the Home so as to perform the Union's bargaining agent functions. However, absent an emergency circumstance, the Union Official desiring to enter the Home, to meet with management or with the employees, must provide reasonable notice to the home's administration.
>
> …
>
> Absent compelling reasons, when a Union Official desires to come to the home to meet with the Home's employees, the Union shall ordinarily provide forty eight (48) hours notice to the Home's administration. … The Home shall provide a reasonable location for such meetings. It may be necessary to change the location to another reasonable location at the end of the shift if the meeting place is otherwise needed for another important business reason.

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[8] No. 08 Civ. 6550 (DLC) (S.D.N.Y.)

[9] On September 19, 2008 Judge Cote denied Respondent's request to deny certain strikers reinstatement. Respondent had alleged that these striking employees had committed strike misconduct.

> The Home shall permit Chapter meetings in the Home, in a reasonable place (which may be changed to another location at the end of the shift due to another important business reason) at least once a month on each of the Home's work shifts.

Noreen Wray-Roach is the Union organizer assigned to the Kingsbridge location. Wray-Roach testified that beginning in 2005 she followed the principles set forth in the Impartial Chairman's award to gain access to the facility in order to meet with the unit employees. Until the summer of 2007 she would meet with the workers every Thursday from 6:30 am to about 7:30 or 8 am and again from 11 am to 4 pm or 2 pm to 4 pm. Since many unit employees work in three shifts from 7 am to 3 pm, 11 am to 7 pm and 11 pm to 7 am, this schedule enabled her to be available to workers on all three shifts.

Wray-Roach would typically send a letter to the Administrator of Respondent on the Friday or Monday before the Thursday of her intended visit and request the use of a room for her meeting. A reply from Kingsbridge would normally be faxed to her office. Wray-Roach usually met with employees in the first floor conference room. If that location was being used Wray-Roach held her meeting in the social service office near the front door of the facility. Wray-Roach signed in at the reception desk when she entered the facility.

The record contains numerous examples of the correspondence between Wray-Roach and the various Administrators of Kingsbridge.[10] Citing but a few of these examples, on March 6, 2006 Assistant Administrator Solomon Rutenberg informed Wray-Roach that the conference room was available on March 29 from 6:30 am to 7:30 am and from 11 am to 4 pm. On July 18, 2006 Administrator Laurence Abrams told Wray-Roach that the conference room was available on July 20 from 6:30 am to 7:30 am and from 2 pm to 4 pm. On August 21, 2006 Wray-Roach requested a room for August 24 and on August 23 Abrams informed her that the conference room would be available from 6:30 to 7:30 and 2 pm to 4 pm, but, he stated, "[W]e expect the New York State Department of Health to survey the facility. If this happens on the same day of your request, you will be asked to come back the following week."

On April 10, 2007 Wray-Roach asked Abrams for a room on April 12 and on the same day Abrams informed her that the conference room was available from 6:30 am to 8 am and from 1 pm to 4 pm. This type of correspondence continued between Wray-Roach and Abrams in the same vein; sometimes the conference room was available only from 6:30 am to 8 am and sometimes the room was not available at all. Abrams was prompt in replying to Wray-Roach's requests and he apologized when he was gave her short notice.

On July 20, 2007 Wray-Roach asked for a room for July 26. She received a reply from Administrator Jacob Perles on July 23 stating that the conference room would not be available on July 27.[11] On July 27 Wray-Roach wrote to Perles requesting a room for August 2 from 6:30 am to 8 am and 11 am to 4 pm. On July 30 Perles advised her that the conference room would be available August 2. He did not specify any times for Wray-Roach to use the room.

On August 3 Wray-Roach sent a request to Perles via facsimile for a room to meet with members on Thursday August 9 from 6:30 am to 8 am and 11 am to 4 pm. Perles denied her request for a room in correspondence which was dated August 7 but which did not reach Wray-

[10] New Administrators appeared at the facility from time to time.

[11] Perles worked for Respondent from May 2006 to August 2008. His tenure overlapped with that of Abrams who left the facility in July 2007.

Roach until the afternoon of August 9.

Wray-Roach testified that at 6:30 am on August 9 she signed in at the facility's reception desk and went to the conference room where she met with those employees whose shift ended at 7 am. While she was there she received a phone call from Perles who said, "Didn't I tell you that you should not be in the facility?" Wray-Roach asked why and Perles replied that he would be using the conference room. Wray-Roach said that Abrams used to let her use the room in the morning if he was not using it then. Perles stated, "I don't want you in the building unless I'm here." When Wray-Roach asked for a reason Perles replied, "Because I want to monitor you."

Perles was not in the building when he spoke to Wray-Roach. He testified that she became "verbally abusive" and started screaming and yelling at him, saying that he never made a room available and that she had to speak to the members. Perles denied telling Wray-Roach that he wanted to monitor her. Perles did not specify what verbally abusive words Wray-Roach had used. Perles testified that there was a quality assurance meeting in the conference room scheduled for 9 or 10 am on August 9. He maintained that he did not offer Wray-Roach another location to meet because the practice was not to offer an alternative location.

After Perles told Wray-Roach that he did not want her in the building she left the conference room and went to the front desk where she asked receptionist Nadine Boyce whether there was a notice stating that she should not be in the facility. There was no such notice. Wray-Roach then left the building. Perles testified that after he finished speaking with Wray-Roach he instructed Boyce to call the police and have Wray-Roach removed. There is no evidence that such a phone call to the police was made.

Soon after she left the building Wray-Roach telephoned Perles twice, each time leaving a message asking if there were anywhere else she could meet with employees. Perles did not return Wray-Roach's calls.

On August 14 Respondent's attorney Joel Cohen wrote to Union Attorney Hanan Kolko alleging that Wray-Roach had argued with Perles and had been abusive on August 9.[12] Cohen's letter closed by stating, "Please notify the Union that until this matter is resolved, Kingsbridge will not make its facilities available for Union meetings."

On August 16 at 6:30 am Wray-Roach went to Kingsbridge and spoke to Boyce at the reception desk. Boyce began crying and told Wray-Roach that she could not admit her because she had been suspended for 5 days for admitting Wray-Roach the week before. Boyce said she had been instructed to call management if Wray-Roach appeared at the building and she tried to reach Perles but he was not there. Then she called Sieger and passed the phone to Wray-Roach who stated that she was there to meet with the members. Sieger said that Wray-Roach was unauthorized and threatened to call the police if she did not leave. Wray-Roach left the building and a patrol car pulled up to the facility. Boyce told the police that her boss said Wray-Roach was not allowed in the building. After Wray-Roach showed the police her ID and business card, they left without taking any action.

Donald Boyce, the widower of Nadine Boyce, was called to testify by Respondent. He stated that in August 2007 his wife was suspended for five days because she let the Union representative into the facility. Another reason for the suspension was that she was not

[12] Cohen's letter did not give specifics of the alleged verbal abuse.

successful in reaching Sieger or Perles to let them know that Wray-Roach was on the premises. Nadine Boyce had tried calling them but they did not answer their phones.[13] Donald Boyce testified that Sieger told his wife that she could be fired but instead she would be suspended.

Beginning on August 17, and continuing to September 28, Wray-Roach wrote to Perles requesting a room to meet with employees. Perles denied her requests for a room to meet with employees for August 23, August 30, September 13, September 20, September 27, and October 4 2007. Because she was not allowed in the building, Wray-Roach met with the unit members at her accustomed times on the sidewalk across the street from, and in full view of, the facility. This regimen continued until the employees went on strike.

Perles testified that he spoke to Union vice president Isaac Nortey about meeting to discuss the access issue. He could not recall when this conversation took place, not even the whether it took place in the fall of 2007 before the High Holy Days or in the spring of 2008 before Passover. Perles remembered that on another occasion he told Nortey to have the Union attorney call Respondent's attorney.

2. Request for Information

Article 11, B of the collective-bargaining agreement provides:

Staffing Schedules

1. Each Employer shall post in the facility a staffing schedule for all bargaining unit Employees with full and part-time slots. …

2. Each Employer shall be required to schedule Employees on a twenty-eight (28) day schedule in the form attached hereto as Schedule "C" and shall provide the Union and the various Nursing Home Funds on a monthly basis with a complete and legible copy of each such twenty-eight (28) day schedule within ten (10) business days after the period covered by the schedule. Such submission shall be made without the necessity of a prior request by the Union.

On June 13, 2007 Wray-Roach wrote to Administrator Abrams reminding him that he had not been submitting the monthly schedule to the Union. According to Wray-Roach, when she spoke to Abrams about this problem he informed her that he had passed the request to Sieger. Later, when Wray-Roach asked Administrator Perles for the schedules and a list of members he told her to put the request in writing. On August 3, Wray-Roach sent Perles a fax stating:

The Union is requesting a listing of all Bargaining Unit employees by;

Date of hire
Department
Shift
Status
Rate of Pay
Social Security

[13] These calls would have been made at 6:30 am.

We are also requesting a monthly schedule, as soon as possible.

Wray-Roach testified that she never received the requested information.

Sieger testified that lists of employees are furnished to the Funds with the monthly payments. Sieger thinks that these go to the Union office. She acknowledged that the reports do not show a date of hire, do not show whether the individual employee works full-time or part-time, do not show the shift worked by the employee or whether the employee is receiving a shift differential, do not show the employee's rate of pay and do not show whether overtime was paid to an employee.

3. Failure to Pay the Funds

As described above, the collective-bargaining agreement requires Respondent to make monthly contributions to the six funds comprising the 1199/SEIU Greater New York Benefit Fund. Judge Fish's decision found that Respondent had ceased making any contributions to the Funds in August 2007. The Board ordered Kingsbridge to, "Pay into the Union's Funds those contributions that it failed to make on behalf of its unit employees, as set forth in the remedy section of this decision, and continue to make the required timely contributions until such time as it bargains with the Union in good faith to an agreement or the parties reach an impasse." The remedy section of the decision noted that the employees had begun a strike on February 20, 2008 and that the strike was continuing. The decision stated, "It is well established that strikers, whether economic or unfair labor practice strikers, are not entitled to compensation for the period they are on strike, and benefits paid to the Union Funds are considered part of compensation. Thus Respondent was not required to make contributions to any of the Funds for the time that such employees were on strike. (citations omitted) Here, the record is silent as to how many of Respondent's employees were striking and for how long, or whether or not any of the employees were on a leave of absence during the strike." The Board left the determination of the contributions owed to the compliance stage, including contributions on behalf of non-striking employees.

Judge Fish's determination that Respondent failed to make payments to the Funds was made as of May 1, 2008. Anthony Petrella, the manager of contracts and collection for the Union Funds, testified that the first payment received by the Funds after that date was a check date stamped on both September 4 and September 5, 2008 for $243,993.01. The amount remitted was applied for the period July 2007 through December 2007, including interest. The parties disagree whether that is the correct amount due or an overpayment, but this is a matter for the compliance stage of the proceeding. Petrella testified that payments to the Funds have continued since September 2008. Although contributions were not due on behalf of striking employees for the period when they were on strike, payments should have been made on behalf of employees who worked during the strike.

The parties agree that the contributions actually being remitted are not being calculated by Kingsbridge pursuant to the percentage contributions rates set forth in the successor to the 2002-2005 agreement. Indeed, there is a dispute whether the contributions are being calculated correctly even under the 2002-2005 contract rates. That is a matter for the compliance stage of the proceeding. The General Counsel argues that Respondent should have executed a new collective-bargaining agreement reached on March 6, 2008 and should have made contributions to the Funds at the percentage contribution rates sets forth in that agreement. As will be seen below, I find merit to the General Counsel's argument.

4. August 2007 Staff Meeting

As discussed above, while Respondent had made back payments to the Funds pursuant to the Settlement Agreement of June 8, 2006, Respondent did not adhere to the requirement to make timely contributions to the Funds in the future. Further, Respondent ceased making payments after an August 2007 remittance which was credited to contributions required for May 2007. On August 29, 2007, the Director of Contracts & Collections sent a letter to Kingsbridge as a "First Step termination of benefits notification." The letter set forth amounts owed for missed contributions, plus interest, totaling about $1.5 million. The letter continued:

> Pursuant to the collective bargaining agreement, the Funds have provided coverage for the collective bargaining unit in your employ. Your failure to remit the necessary contribution payments requires the Fund to take action.
>
> This letter serves as a formal notice the Kingsbridge Rehabilitation must remit the contributions owing, on or before September 29, or the Funds will notify covered employees that their benefits will terminate in 30 days. ….

This notice did not come as a surprise to Respondent. On August 27, 2007 Respondent's attorney Joel Cohen had sent a letter to Union attorney Kolko requesting negotiations on Kingsbridge's proposal that it be given up to seven months to make payments to the Funds without being considered in arrears.[14]

Sometime in August 2007, after Wray-Roach was no longer permitted into the building, Sieger held a staff meeting with unit employees. Kervin Campbell, a Union delegate and a cook with 20 years service at Kingsbridge, testified that in August he heard an announcement that the staff would meet with Sieger in the dining room at 1:45 pm. Campbell attended the meeting with about 30 or 40 Union members. Sieger was accompanied by Administrator Perles, and a Nursing Director whom he named as Ms. Lydastraw, presumably Loida Chua.

Campbell testified that Sieger told the employees she had heard that the Union was going to terminate their benefits. Sieger said that she would give the employees $450 for the medical bills. If the employees wanted this they could go downstairs and pick up an insurance form.[15]

Sieger denied bypassing the Union. She testified that in 2006 employees had asked her about medical benefits when the Union suspended them and that she replied she would seek out companies to get bids on medical coverage, but she had never obtained any cost figures. Sieger denied mentioning the sum of $450 in August 2007.

Campbell also testified that Sieger said she had heard that the Union was going to strike for three days. She said if the strike is for three days "it will be for three weeks" because she had to go to an outside contractor for replacements.[16] Sieger denied that she threatened to refuse to timely reinstate strikers at the staff meeting in August 2007. Sieger recalled that when

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[14] The Board has determined that this proposal and the Union's failure to respond to the proposal is no defense to the failure to make the required Fund contributions. 353 NLRB No. 69.

[15] Campbell's affidavit says Sieger promised the employees $450 per month for medical bills.

[16] Employee Toma Beica testified to the same effect.

a strike had been threatened in 2006 she had told employees that her arrangement with the Towne Agency required her to commit to a minimum of four weeks employment. Sieger said she "probably restated" this before the strike in 2008. Sieger testified that Towne and the other agencies have a four week minimum commitment and that they would not charge her for orientation if the employees were used for four weeks.

Meyer Greisman, the owner of Towne Nursing Staff, Inc., testified that he is a business acquaintance of Sieger. Greisman is no longer the day-to-day manager of Towne. The principal business of Towne is to provide temporary and replacement help to nursing homes, and every once in a while, to provide replacements for striking employees. Greisman testified that costs are incurred in providing replacements for a strike including advertising, interviewing and background checks. When Kingsbridge was anticipating a strike in 2006 he and his son met with Sieger and explained that they would require a 30 day payment guarantee for strike replacements. If the strike ended early he would still expect to be paid for 30 days of work. Before the strike in 2008 Greisman reiterated this requirement to Sieger; Griesman did not recall when this conversation took place. Towne did not did not have a written contract with Kingsbridge and the guarantee was not set forth in writing. When Greisman spoke to Sieger he informed her that he did not know how much he would have to pay replacement workers. He said if it cost him more then it would cost her more. Greisman testified that during the 2008 strike he supplied CNAs to Kingsbridge. He did not know how many employees he supplied and he did not know if another agency supplied replacement workers.

5. Termination of Health Care Benefits, the Strike Vote and Informational Picketing

Union organizer Wray-Roach testified that she had been notified about the possible termination of employee health benefits before the August 29, 2007 letter warning of this possibility was sent to Respondent. She had also been notified that the employees would receive a letter to this effect before it was actually sent out. The notice, addressed to the bargaining unit at Kingsbridge, was dated October 3. The letter informed the employees of the extent of the delinquency in contributions to the Benefit Funds and it further stated:

> "[T]he Funds deeply regret that effective November 3, 2007, all your hospital, health, prescription drug, dental and related benefits available to you … must terminate.

Wray-Roach testified that she discussed the termination of health benefits with bargaining unit members. They told her that they were upset that their benefits might be terminated yet again. Many of them said they should have struck in 2006, and voiced the opinion that if they had struck in 2006 they would not be faced with the same issue again. According to Wray-Roach the employees were angry with the Union and they said they wanted to strike once and for all and get it over with. She informed her Union colleagues of the employees' sentiments.

Around October 7 Wray-Roach distributed a flyer outside the facility. It was addressed to 1199 members and proclaimed "Emergency!" The flyer stated that medical benefits for employees and dependents were being terminated because Kingsbridge had stopped making contributions to the Funds. The flyer continued:

> Please let management know that we will not tolerate injustice against our lives!
> We will demand
> The signing of a full contract,
> Enforce the National Labor Relations Board Decision,
> Strike Vote.

The flyer invited employees to "discuss our response" on October 17, 2007 in front of the facility at 7 am and 2 pm to 4 pm.

Wray-Roach testified that on October 17 she met with employees from all three shifts in front of the facility. Union delegates who worked in the facility were present. Wray-Roach told the employees that they had been asking for a strike and now they had to vote and decide whether to strike. Wray-Roach explained that there was a secret ballot and that the ballot should be deposited into the ballot box. The ballot itself was entitled "Strike Vote" and stated "We the members of 1199 @ Kingsbridge Heights Nursing Home authorize the Union to send 10 days notice of a strike." At the bottom of the ballot were two squares, one titled "yes" and one titled "no." Similar meetings were held outside the facility on October 18, and 20.

Kervin Campbell testified that Wray-Roach and Union Vice President Nortey spoke to employees at the outdoor meetings about the loss of their benefits. Employees carried signs stating, "We need our benefit." Some signs warned of the termination of the benefits.

Wray-Roach testified that the outdoor meeting held on October 18 was attended by Michael Rifkin, the Executive Vice President of 1199, SEIU. This meeting drew many employees who wanted to meet Rifkin and hear what he would say. At about 3:15 pm Wray-Roach saw Tony Szereszewski, the Director of Housekeeping, videotaping the crowd from the roof of the building. He had a hand-held camera that was pointed at the employees gathered in the street below. Szereszewski moved away when he realized that he had been spotted by the employees and the Union officials.

The Union delegates distributed ballots to employees and requested each employee receiving a ballot to sign a sheet. Employees who did not attend the meetings held outside on the street could obtain a ballot from a delegate inside the building. On October 17, 18 and 20 the ballot box was manned by Union agents on the street in front of the facility. The box was sealed at night and steps were taken to prove that it had not been tampered with.

Campbell testified that before the ballots were cast he spoke to employees in the dining room. He told them that the Union was conducting a strike vote because their benefits had been terminated.

Employee Bibi Rakeba Seebaran, an activity leader, testified that she voted to go on strike because the employees did not have any benefits at the time of the vote. Sheila Jolly, a certified nursing aide (CNA), voted to strike because she was concerned about her benefits and her pension. CNA Noeler Worrell voted to strike because she did not have any benefits and could not see a doctor; eventually she was fed up and voted to in favor of striking. Campbell testified that the reason for the strike was that employees did not have their benefits.

Employee Wojciech Orlos, a porter at the facility, testified that he saw the notice that his health benefits would be terminated and a notice calling a meeting to consider a strike. Orlos said he voted for the strike because "we were out of contract for a long time and benefits were stopped." Toma Beica, a porter, voted to strike because employees needed a contract and needed benefits. Dietary aide Julian Marut testified that when his health benefits were stopped he could not fill his pharmacy prescriptions: he voted to strike because his benefits were suspended and "we did not have a contract".

Wray-Roach testified that the Union collected 170 strike ballots. These were counted on October 22 at a meeting conducted on the street in front of the facility. The vote was 166 for a

strike and 4 against.

By notice of November 13, 2007 the Union informed Respondent and the FMCS that it intended to conduct informational picketing at the facility from 2 pm to 7 pm on November 28, 2007. The record evidence shows that the picketing was peaceful and without incident. Toma Beica testified that when he entered a patient's room that day to remove the trash he encountered Assistant Administrator Gregory Korzeb with a uniformed maintenance employee.[17] They opened the window and adjusted a camera so that it pointed to the area where employees were picketing. Beica told the two men that they were not allowed to record the picketing but they laughed. Korzeb did not testify herein. Wray-Roach testified that a Filipino man stood in the lobby of the facility wearing royal blue scrubs. The lobby glass was transparent and Wray-Roach could see that he was pointing a hand-held camera at the picketing employees. After Wray-Roach informed Union attorney Sarah Newman of this fact, Newman spoke to the Administrator and the filming ceased. However, when Newman left the man resumed videotaping the pickets. CNA Elizabeth Browne, who also witnessed the videotaping, identified the Filipino man as an employee from purchasing named Jake.

On December 7, 2007 the Union gave Respondent and the FMCS notice of its intention to conduct informational picketing at the facility from 2pm to 6pm on December 18, 19 and 22, 2007. The record evidence shows that the picketing on those days was peaceful and without incident.

Beica testified that on December 18 he was sweeping on the second floor when he saw Director of Housekeeping Tony Szereszewski bring in an outsider who was carrying a video camera. The two men entered room 243 and then the outsider proceeded to film the picket line across the street. Beica told Szereszewski that it was not right to record the employees and the latter walked away. Wray-Roach testified that on December 18 Jozef Hubacek stood on the sidewalk near the parking lot and pointed a handheld camera at the picket line.[18] On December 22 both Hubacek and a Filipino woman videotaped the pickets.

6. Threats to Discharge Union Supporters

Wojciech Orlos, a porter in the housekeeping department, has been a Union delegate since 2007. His supervisor is Director of Housekeeping Szereszewski. Orlos testified that in October 2007 Szereszewski told him that he was first on Sieger's list to be fired. No cause was specified for this threat. On December 10, 2007 Szereszewski instructed Orlos not to participate in picketing so as to avoid having problems with Sieger. Orlos replied that he was not doing anything wrong. Later that same day Szereszewski again spoke to Orlos and told him to avoid Union activity and be careful in doing his work. Szereszewski said that Orlos was one of the people who would be fired.

7. Reimbursement of Union Dues

Sieger testified that Respondent had continued to deduct Union dues from the employees' pay after the expiration of the 2002-2005 contract and Respondent had continued to

[17] Beica was employed by Respondent from April 23, 1999 to January 28, 2008. At the time of the picketing his hours were 7am to 3 pm.

[18] Hubacek was the assistant to the Director of Purchasing and was promoted to Director in February 2008.

remit the dues to the Union. Sieger said in late October 2007 she was informed that she was not allowed to deduct dues because there was no collective-bargaining agreement. At that point Respondent stopped deducting the dues. In October 2007 she held a meeting with employees and informed them that she would cease deducting dues. Employee Beica testified that Sieger told the employees that she would give them checks because the Union dues she had collected was their money.

Sieger testified that she offered to return one year's worth dues to each employee. Sieger stated that although the contract had expired in 2005 she only offered to return the dues collected from October 2006 to October 2007 because "it's a lot of money." In order to receive a check equal to one year's dues employees had to sign a form prepared by Administrator Perles. The form is titled "Union Dues Money." Employees were instructed to write their names and sign in either a space at the top with a statement that said, "I accept the union dues money that rightfully belongs to me from October, 2006 through October, 2007" or at the bottom where the statement was, "I decline to accept the union dues money that rightfully belongs to me from October, 2006 through October, 2007." At the end of the meeting, Sieger's secretary distributed checks to those who signed the form accepting the money and employees knew that they could obtain a check in the weeks that followed by going to see the secretary and signing the form.

The employee paystubs for November 7, 2007 contain an item entitled "Union dues adjust" equal to one year's Union dues. This amount is shown whether or not the individual employee elected to receive the reimbursement.[19] The employee pay stubs show that dues are calculated as 2% of the gross wages of the employees.

8. Individual Employee Contracts

Administrator Perles testified that about 12 employees had approached him at different times and asked what would happen if they decided not to strike. The employees wanted to know about their rates of pay and benefits and whether they would lose accumulated leave days. Perles told them he could not discuss this subject because they belonged to the Union. Sieger testified that she also spoke to employees who had questions about their conditions of employment if they resigned from the Union. Sieger told the employees she would draft something after the employees showed that they had resigned from the Union. After the employees gave Perles letters of resignation from the Union he told them they would get the same benefits as under the Union contract. The employees asked him to put it in writing. Perles testified that he offered the employees individual contracts.[20] Although Perles could only remember the names of two employees he spoke to, Nadine Boyce and Jozef Hubacek, he recalled that employees from many departments resigned from the Union. All of these employees were given contracts but the wording of the contracts varied in some respects. The contracts provided for a term from either February 7 or 28, 2008 to December 31, 2013; they included provisions for wage rates and wage increases, a health plan and other benefits. Some employees retained an attorney; their contracts contain a clause stating that they were represented by legal counsel.[21] All of the individual contracts provide:

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[19] To cite only a few examples, employees Pansy Shaw, Julian Marut and Wladyslaw Chichon never accepted a check but their paystubs show a "union dues adjust" amount.

[20] Sieger directed Perles to draft the contracts.

[21] Respondent did not provide copies of the actual signed contracts as requested by the General Counsel's subpoena and Respondent did not explain its failure to produce the contracts. Respondent did not assert that it did not have the signed contracts. The contracts in evidence are not signed.

> By signing this agreement you affirm that you are not a member of any union and will not join throughout the duration of this agreement.

Orlos testified that in February 2008 he went to a location in the facility where he had been informed there was a negotiation for individual contracts. Assistant Administrator Gregory Korzeb and Housekeeping Director Szereszewski were guarding the door and they refused to admit Orlos because he had not resigned from the Union. Orlos asked to see the contract but Korzeb said it was not possible. Later, Szereszewski showed Orlos the pay stubs of employees who had signed the individual contract and told Orlos it would be nice to get checks like that. Szereszewski told Orlos that the following employees had signed the contract: Ryszard Wojcik, Ryszard Slominski and Jerzy Grzymkowski. Eventually, Orlos obtained a blank contract from employee Barbara Laveska.[22]

Perles testified that he later found out that he was not legally permitted to offer a contract to the employees. He issued a memo dated March 31, 2008 which was posted near the time clock and placed in other areas of the facility. The memo stated:

> As a valued employee, you have numerous rights under Federal and State laws. This Administration would never think of or try to take away any of those rights from you. We recognize and readily admit that, as an employee of our facility, the law gives you the absolute right to form or join any labor organization as permitted by law. We will never take those rights away from you and we will never discriminate or retaliate against or otherwise interfere with your right to join or refrain from joining a union.
>
> Any statement in your employment agreement where you affirmed that "you are not a member of any union and will not join (a union)" was a mistake on the part of the Administration and we were wrong. This statement will never be used for any purpose and is withdrawn. Thank you and we sincerely appreciate your association with our organization and the important work you provide to the residents in our facility.

9. Discipline and Discharge of Employees

Sieger testified that Respondent maintains a system of progressive discipline beginning with a first warning, followed by a second warning, first suspension, second suspension and then termination. For a very serious infraction, some of the steps of progressive discipline might be skipped. Respondent conducts an investigation when discipline is to be imposed, including collecting statements from the individuals involved. Sieger testified that the employee to be disciplined is interviewed before discipline is imposed; Respondent's practice is to call the Union delegate to the interview even before the employee makes a request for representation.

a. The Posting on Five-West

The Complaint alleges a number of violations arising from the posting of a letter-sized paper on the wall next to the nurse's station on floor Five-West at Kingsbridge. Three employees were disciplined after this notice was found on December 18, 2007: porter Wojciech Orlos and CNAs Pansy Shaw and Elizabeth Browne.

The sheet of paper posted on the wall was produced herein by Respondent. It is written

[22] Laveska moved to Texas during the strike.

in a strange decorative writing, with dark shadings on the letters. The entire sheet reads as follows:

All A We A Halla

Helen Seiger – All A We A Halla
We A Bawl
Helen Seiger – All A We A Halla
We A Bawl
She is A Liar
All A We A Halla
We A Bawl
She is A Robber
All A We A Halla
We A Bawl
She is A Traitor
All A We A Halla
We A Bawl
She is a Deceiver
All A We A Halla
We A Bawl
Manipulator
Sign The Contract
All A We A Halla
We A Bawl

There are three little faces with downturned mouths and teary eyes along the borders of the sheet.

Agnes Casimiro was the in-service training coordinator at the time relevant to the instant proceeding.[23] Casimiro testified that she conducted in-service education on April 25, 2007. [24] She reviewed mandatory topics with the staff during which she gave a lecture, distributed a "handout" and provided an opportunity for employees to ask questions. The "handout" was not produced at the instant hearing. Casimiro's written outline for the session showed that after her presentation the staff should have the ability to accomplish certain tasks including:

> Discuss Abuse Prevention/Workplace Violence Prevention
> a. Verbal Harassment – verbal threats toward person or property
> b. Physical Harassment – any Physical assault such as hitting, pushing, kicking, etc.
> c. Visual Harassment – derogatory or offensive posters, publications or drawings
> d. Prohibited items on company property – object carried for the purpose of injuring or intimidating
> Reporting to a supervisor any derogatory or offensive posters, publications or drawings.

Casimiro explained that there had been an incident where a resident had written "something" on a window and the staff was not aware that it was supposed to be reported. Casimiro said she was asked to tell the staff about prompt reporting "of anything that they see

[23] Casmiro has been Respondent's Director of Nursing since September 2008.

[24] Employees Elizabeth Browne and Pansy Shaw were among the employees who signed attendance sheets for the training sessions.

on the floor … if they feel or they think it would be a potential or offensive, they have to report it right away to the nurse or to the supervisor." When asked to elaborate on what she told the employees about visual harassment, Casimiro replied that she did not recall anything else, "I just told them that anything that they see."

The current employee handbook contains a section on "Workplace Violence Prevention – Policy on Employee Conduct", including a sentence reading "Visual Harassment: Derogatory or offensive posters, cartoons, publications or drawings." A section entitled "Rules of Conduct" lists "infractions of rules" which "will be deemed grounds for dismissal." Included on the list is "Visual Harassment – Derogatory or offensive documents, illustrations or pictures." Another Section entitled "policy on employee conduct" provides that "No employee shall be allowed to harass any other employee or member of the general public by exhibiting behavior including, but not limited to the following: … Visual Harassment: Derogatory or offensive posters, cartoons, publications or drawings."

Sieger testified that the paper was on the menu board close to the nursing station on Five-West. Employees who commonly frequent the nursing station include physicians, nurses, LPNs and CNAs. Sieger participated in the investigation which was conducted to determine which employees had seen the paper posted on the wall. She interviewed everyone once and then employees who had seen the notice were brought back after their warning notices were written up. Sieger explained that employees who admitted that they had seen the paper were disciplined because those people had laughed about the paper amongst themselves.[25]

b. Pansy Shaw

Pansy Shaw worked as a CNA at Kingsbridge from November 4, 1997 to January 4, 2008. In December 2007, her hours were from 7 am to 3 pm. When Shaw emerged from the elevator on Five-West at 7 am on December 18 she saw a notice posted right next to the nurse's station. Shaw did not read the notice. She could not say if it contained little drawings of sad faces. When shown the document in evidence, Shaw said it looked like that paper. Shaw speaks Patois, a Caribbean language. In Patois "holla" means "shout and "all a we a holla" means "we are shouting." "We a bawl" means we are crying.

After Shaw saw that there was a paper posted on the wall she asked her co-worker Elizabeth Browne what was going on. Browne replied that she had seen the paper but she did not have her glasses on so she would read it later. Later that morning Assistant Director of Nursing Rosalyn Sacramed approached Shaw on the floor and asked if she had seen the paper. When Shaw asked "what paper?" Sacramed showed her a paper that looked like the document in evidence. Sacramed asked Shaw if a patient had done the paper. Shaw replied that she did not know. Then, Charge Nurse Zell asked Shaw to write something about the paper that was on the wall. Shaw said she knew nothing about it and she declined to write anything. Later that day Shaw and other employees were called to a meeting with Executive Director of Nursing Loida Chua.[26] Chua asked the employees if they knew anything about the paper. Shaw and

[25] Sieger testified that dietary employee Eldon Golding told her that the paper called her a whore. However, Golding testified that he was shown a paper different from the one in evidence and he testified that it contained the word "horlott." This document was not turned over in response to General Counsel's subpoena and I have stricken all the testimony relating to it. I am not convinced that this paper actually existed.

[26] The others present were Elizabeth Browne, Orlos and Tacco. Tacco was not further identified on the record.

Browne said they had seen it on the wall; Orlos and Tacco said they had not seen it. Soon afterwards, Shaw was summoned to Sieger's office where Sieger asked if she had seen the paper. Shaw replied that she had seen it. When Sieger asked what she had done about it, Shaw replied that she had done nothing and asked what she should have done. Sieger told Shaw she should have reported to higher authority but Shaw responded that it was not her responsibility.

On December 19 Shaw was again called to Sieger's office. Shaw testified that Sieger said, "You know about the poster that was on the wall. I have a witness who tells me that you knew who did it." Shaw asked to see this witness. Sieger responded that Shaw was dishonest and telling a lie. Shaw asked to obtain a Union delegate. Sieger told Shaw that she did not need a Union delegate. Sieger added that she could suspend or fire Shaw "tomorrow". When Shaw asked for a reason, Sieger said it was because Shaw was dishonest. Shaw again denied any knowledge about the poster and again asked if she could go and get a Union delegate. Sieger refused, saying, "You don't need a delegate, only if you are terminated."

On December 26, Shaw and Browne were called to Sieger's office. They took Union delegate Kervin Campbell with them. Sieger insisted that Shaw enter her office without the delegate. Sieger asked Shaw, "Do you want your job or don't you want your job?" When Shaw asked what she had done to lose her job, Sieger accused Shaw of telling a lie and told her that she was terminated.

Shaw called the Union and spoke to Vice-President Isaac Nortey who advised her to keep doing her job since she had not been given a pink slip. Shaw went back to work and performed her regular shifts until January 4, 2008. On that day Shaw was called to Sieger's office where she met with Sieger and Perles. Sieger asked whether Shaw cared for a patient named Helen Spekman. Shaw said she was not assigned to that patient but that she cared for her occasionally. Sieger told Shaw that she had received a letter from Mrs. Spekman's son. As Sieger described the letter to Shaw, it stated that Shaw had told the son that there would be a strike and skilled workers would be replaced with unskilled workers. As a result Mrs. Spekman would not get good care. The letter said Shaw had urged Mr. Spekman to report these matters to the "Riverdale Press."[27] Shaw denied having made such comments; she said Mrs. Spekman had three sons whose names she did not know. Then Sieger showed Shaw the paper that had been found on the wall of Five-West. Sieger asked if Shaw was Jamaican and Shaw said she was. Sieger told Shaw that if she had seen a paper that accused Sieger of being crazy she would have taken it down. Shaw replied that people do what they want to do and say what they want to say. Perles commented that the paper was the same as abuse. Sieger said the Union was going to strike and asked whether Shaw had voted for the strike. Shaw acknowledged that she had voted in favor of the strike. Then Sieger said Shaw could be terminated. Shaw asked Sieger why she did not have health coverage and she said she had heard it was because Sieger was not contributing to the Benefit Fund. Sieger again stated that she had a witness who told her that Shaw knew about the paper on the wall. Shaw asked Sieger to bring this witness. Sieger accused Shaw of being dishonest; she asked whether two people could be telling lies about Shaw. Shaw said, "yes"; she did not know about the paper and she did not make those comments to Mr. Spekman.

Shaw was called to Sieger's office a second time on January 4 and given two disciplinary notices signed by Chua. Union delegate Campbell was there, as well as Chua and Sacramed. Shaw was a given a "Final Warning" notice for "violation of policy/procedure on

[27] This is a local Bronx newspaper.

employee conduct" that read in pertinent part:

> You admitted that you saw the paper…. This is a violation of KHRCC policy on workplace violence prevention since you have failed to report it immediately…. The paper contained disparaging and derogatory statements and failed to prevent damage to whom it was addressed.

. Shaw was also given a termination notice that read:

> We received a letter from Mr. Albert Spekman…. He voiced out his concern regarding the care of his mother. On one of his visits at the facility Ms. Pansy Shaw conveyed to him that if Union members voted to strike, skilled workers would be replaced by unskilled health care providers. She also encouraged Mr. Spekman to report KHRCC to Riverdale Press. Our staff at Kingsbridge Heights was disturbed about your negative comments due to our staff working very hard to provide good quality care for our residents. KHRCC does not tolerate any employee spreading malicious and negative remarks about Kingsbridge therefore effective immediately your services are terminated.

Shaw testified that she had not been given an employee handbook by Kingsbridge and she did not recall being told that she was required to report derogatory or offensive posters to a supervisor. Shaw attended the in-service training conducted by Kingsbridge every three months. These meetings are concerned with patient care. Shaw's signature appears on an attendance sheet for meeting held on April 25, 2007. Shaw could not recall the details of this meeting. However, Shaw testified that she was not given a sheet of "Mandatory Topics" for an in-service meeting held that day.

Shaw recalled that she had been suspended once before when a patient slid out of her wheel chair. Shaw had never seen the actual warning notice. The notice, dated September 21, 2006, does not state clearly what infraction Shaw was punished for; the infraction consisted either of not returning the patient to an upright position immediately or of discussing in the presence of others the patient's proclivity to slide down into her chair.

Sieger testified that she was not aware of any Union activity by Shaw. Sieger denied asking employees whether they had voted to strike. Sieger denied interrogating anyone on December 18, 2007. Sieger testified that the ultimate responsibility for issuing discipline lies with the department head. The ultimate responsibility for disciplining Shaw thus rested with Chua, the Executive Director of Nursing. Sieger stated that she "may have" seen the warning notices to Shaw at the time they were issued. She testified that Chua consulted with her about the discipline related to the paper posted on the wall of Five-West although she could not recall at what stage this occurred. Shaw was disciplined for failing to report an offensive poster but Respondent does not contend that Shaw posted the paper. Sieger testified that she did not rely on the poster incident to terminate Shaw.

Sieger testified that Shaw was terminated because she received a letter from Albert Spekman and based on the information he provided when he spoke to her at Kingsbridge. Sieger interviewed Spekman who informed her that Shaw had told him "we are going to have unskilled employees, we will not have care for his mother." Describing her interview with Spekman, Sieger testified he told her Shaw said if there was a strike his mother would not have care because the facility would hire unskilled workers. According to Sieger, Spekman was at first reluctant to name the employee because he feared retaliation against his mother but eventually he identified Shaw by name as the employee. Sieger testified that as a rule employees are assigned to specific patients and Shaw had been assigned to Mrs. Spekman "for

a while."

Perles was present when Sieger met with Spekman. Perles recalled that Spekman said his mother was receiving great care. He had been a union employee for most of his life and respected the right to organize, but he thought a strike would be a terrible thing. He said he heard on the floor that Kingsbridge would be hiring unskilled workers as replacements. Perles said that Shaw's name came up at the meeting but he could not recall who brought up the name. Perles said it was clear that Shaw had given Spekman the information about what would happen during a strike.

Spekman testified that he visited his mother four to seven days per week, usually at 7:30 or 8 pm.[28] He named the employees who took care of his mother as Audrey Campbell, Verona, Golpe and others.[29] Shortly before December 11 Campbell gave him a letter from 1199 employees addressed to "Families/Neighbors". The letter refers to the absence of a signed contract for Kingsbridge employees and their loss of medical benefits, and says that the employees have voted to go on strike. The letter states that Sieger has advertised in a local paper to hire non healthcare workers and expresses concern about the effects of the dispute on the residents. The letter asks people "to tell [Sieger] to sign the contract and to start making the required contribution for us and our dependents to get back our needed medical benefits."

Albert Spekman's letter, dated December 11, 2007, was addressed to Sieger and copies were sent to a New York City Council Member, a State Assemblyman and the "Riverdale Press." The letter begins by praising the care his mother receives at Kingsbridge and continues:

> I am disturbed to learn that recently KHRCC has cut off medical benefits to its … union members, the very workers who are caring for my mom. Further, I have recently learned that those union members have voted to strike to protect their medical benefits and their jobs, and may be replaced by unskilled health care providers.
>
> The liabilities to both KHRCC and the many residents who are utterly dependent on the skilled care they currently receive are huge. I am sure that you are aware of what the implications could be to the viability of your health care facility.

A few weeks after Spekman sent his letter of December 11, Sieger asked him to see her. Spekman testified that he met with Sieger and Perles. Sieger asked him whether another person had written his letter for him; he replied that he wrote it himself.[30] Sieger mentioned the name of an employee but Spekman did not recognize that name. Spekman testified that he never described to Sieger the person who gave him Union letter and he did not describe the job done by that person. Spekman emphasized that he is not a "squealer" and that he would never have given Campbell's name. In fact, Spekman pointed out, his affidavit given to a Board agent does not mention Campbell by name; it identifies her as "a worker." A few weeks after this meeting, Sieger telephoned Spekman and named an employee who was being terminated.

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[28] Mrs. Spekman was deceased at the time of the hearing.

[29] Spekman knew Campbell only by her first name at that time. However, he later heard that someone named Audrey Campbell had died and that was when he learned Audrey's last name.

[30] Spekman showed the letter to his wife and daughter, a lawyer, before sending it. He knew the local politicians to whom he sent the letter. The "Riverdale Press" had run an article about the possibility of a strike at Kingsbridge.

Spekman did not recognize the name. He testified that he felt awful that a person had lost her job but he did not know what to do about the situation; it was out of his control.

On cross-examination Spekman was asked whether Sieger expressed concern about the impact on the residents of the Union's mention of unqualified replacements. Spekman testified that Sieger was upset because the employees were airing their issues; "She didn't want the workers unloading their issues to me."

c. Wojciech Orlos

Wojciech Orlos, a porter in the housekeeping department, has been employed by Kingsbridge since July 6, 1997.[31] Orlos has been a Union delegate since 2007; he participated in the informational picketing on December 18, 2007 and he went out on strike. Before the strike he worked on Five-West from 7 am to 3 pm.

Orlos testified that on December 17, 2007 between 9 and 10 am he saw a letter-size paper on the wall next to the nurses station on Five-West. Orlos could only make out some of the words because the font was difficult to read. He thought it meant the holidays would be sad because there was no contract. Orlos recognized some English words on this paper but he could not tell what language was used for the other words. The paper did not look like an official Union posting; rather he thought someone was venting frustration. He did not see Sieger's name on this paper and he did not think it referred to Sieger. The next day, December 18, Sacramed showed him a piece of paper and asked if he knew who did that. Orlos said that he had seen a paper with similar handwriting the day before but that he had not seen the one Sacramed had in her possession. Orlos testified that he could not read this paper. Later that day the head nurse asked Orlos to fill out a "Statement of Occurrence." He wrote, "I nothing saw today in front of elevators."

About ½ hour after writing this statement, Orlos was called to Sieger's office where he met with Sieger and Chua. Orlos asked for a witness but Sieger said it was not necessary because they were having a "casual conversation." Sieger showed Orlos a paper and asked if he had seen it. Orlos told her he had not seen the paper although he had seen a similar one the day before. The paper Sieger showed him had to do with "no contract"; it was not nice but Orlos remarked that it was work-related. Sieger warned him, "it could be better that I admit that it was me who did that, because if she found witnesses, then this would be too late." Sieger asked if her name had appeared on the paper he had seen and Orlos said he had not seen her name. Then Orlos commented that the Union had told the employees to take all kinds of protests outside; postings were not allowed in the facility. When shown a copy of the paper Respondent had removed from the wall of Five-West Orlos testified that he had never seen it before. Sacramed had shown him a different paper, one with more text and no drawings of crying faces.

On January 1, 2008 Sieger met with Orlos in the conference room. Orlos testified that Sieger asked whether he liked his job. Sieger said if he did not like his work she would be in a position to send him back to Poland because he did not like America. Then Sieger told Orlos that he was getting paid too much for the work he did. Sieger asked Orlos to remove the contents of his bag and place them on the conference table. Sieger went through his

[31] Orlos, who speaks some English, testified through a Polish interpreter. He stated that he used an interpreter to prepare his testimony and he needs an interpreter to testify. Orlos occasionally interprets for other Polish-speaking employees.

belongings and read documents concerning the Union. She asked Orlos to read her something about the strong lights in the employee picketing area. Finally, Sieger took Orlos to the locker room and she made Orlos open his locker and show her the contents. After she inspected his change of clothes, Sieger told Orlos he could go.

Sieger denied threatening Orlos with deportation, testifying that since he is legally able to work in the USA she could not have him deported.

On January 4, 2008 Orlos was called to a meeting with Sieger, Perles and Union delegate Campbell. Orlos was suspended for two days. He was given a warning notice stating that it was a violation of policy to fail to remove or report the poster he saw on December 17, 2007.

Sieger testified that she wrote the warning notice. When she interviewed Orlos he told her that he saw a different paper on December 17 than the one she showed him on December 18.[32] Sieger testified that "he admitted he saw a poster [on the 17th] that was derogatory and that he did not report it to the supervisor." Sieger maintained that Orlos had informed her that the poster he saw was about her and it was not nice. Sieger never saw that paper and, to her knowledge, no one else did. When asked who made the decision to discipline Orlos for failing to report the poster, Sieger refused to answer the question and became uncooperative. At first Sieger said, concerning the decision to discipline Orlos, "It's not a decision. It's in the policy." Then she said she did not recall who made the decision, saying, "I don't recall. If you get a speeding ticket, does – is that a decision of a police officer? That's the way it's – that – . "

Orlos recalled that he received an employee handbook when he was hired which he testified was "similar" to the document introduced into evidence as the current handbook. Orlos testified that the rule against visual harassment was mentioned twice during in-service training; the employees were told there should be no harassment of patients in order to let them feel at home. Employees were reminded to report incidents of visual harassment.

On January 28, 2008 Orlos heard that employee Toma Beica had been fired. That day, Szereszewski told Orlos to remember that he would be next after Beica. On February 6 Szereszewski assigned Orlos a special job cleaning the baseboards in the dining room and the tiles in the public bathrooms. After Orlos did this work Szereszewski told him that he would inspect his floor. Orlos urged him instead to inspect the work for the special assignment. Szereszewski proceeded to inspect the patient rooms which were Orlos' ordinary responsibility and which Orlos had not had a chance to clean because he was completing the special job. The next day Szereszewski gave Orlos a warning notice for failing to clean certain patient rooms and bathrooms. Orlos wrote on the warning notice that he disagreed with it; he chose that particular wording based on the advice of a more experienced employee.

On February 8 Sieger asked Orlos whether he had filed a complaint with the NLRB. She showed Orlos a document and asked what was meant by the allegation that she wanted to deport Orlos.

On February 12, Tony Szereszewski's father Ryszard asked to speak to Orlos.[33] At that point, Tony appeared and told Orlos he had caught him having a conversation. Later that day Ryszard came to Orlos' work location and said he had something to tell him. After a few

[32] Sieger knows that Orlos is Polish and does not speak Patois.

[33] Ryszard Szereszewski did not testify herein.

seconds Tony again appeared and accused Orlos of having a conversation. On February 12 while Orlos was representing Artur Baczyk in a disciplinary matter Tony Szereszewski told him to watch his work as he would be fired just like Toma Beica. Later that day as Orlos was showing an employee named Teddy a broken bed railing Tony came up and said he caught Orlos in a conversation. Orlos explained that he had reported the broken railing and Teddy had been sent to repair it. On February 13 Ryszard asked to speak to Orlos just as Tony came over to say that he caught Orlos having a conversation. Later the same day Tony found a fresh spot on a floor and called a nursing supervisor over to witness it. Orlos told him that a wheelchair had just made the spot. The next day Tony told Orlos he would get a warning because there was a broken lock in the utility room.

d. Elizabeth Browne

Elizabeth Browne was employed as a CNA by Kingsbridge from February 13, 1986 to February 5, 2008. Browne participated in the informational picketing at Kingsbridge in November and December 2007. Her shift began at 6 am and ended at 2 pm. Browne recalled a day when she came to work and saw a paper on the wall above the nursing station across from the elevator. She tried to read it but could not understand the writing.[34] At the instant hearing Brown was shown the posted document upon which Respondent based its disciplinary measures; she testified it was not the paper she saw on the wall; there were more verses on the paper she had seen. At about 7 am Browne told Shaw about the paper and the latter went to see it. Later that day Assistant Director of Nursing Sacramed asked Browne if she knew who posted the paper on the wall. Browne said she did not know. Eventually Browne was interviewed by Sieger in the conference room. Sieger asked if she knew who put the paper on the wall and Browne replied that she did not. Then Sieger asked, "Do you know you're responsible for taking the paper off the wall?" Browne denied that she was responsible. On January 2, 2008 Browne was called to Sieger's office. She took Campbell with her but Sieger dismissed him. Sieger asked Browne if she wanted her job. Browne said she wanted her job. Sieger said, "Be honest." Browne denied knowledge of the person who posted the paper.

Campbell testified that he recalled a day when employee Pansy Shaw asked him to accompany her to Sieger's office. As Campbell and Shaw walked to Sieger's office they met Browne who said that she had also been called to the office. Campbell told Sieger that Shaw and Browne had asked him to represent them. However, Sieger dismissed him saying "this is not a discipline"; Sieger maintained they did not need a delegate because she just wanted to speak to the two employees. Campbell placed this event on December 26, 2007.

On January 9 Browne was again called to Sieger's office. Browne went accompanied by Union representative Noeller Worrell. Chua also attended the meeting. Sieger asked if Browne was Jamaican; Browne was born in the USA but raised on Montserrat. Sieger informed Browne, "You could be terminated, but instead I'll give you two days suspension." Browne was given a warning notice in Sieger's handwriting stating that she failed to follow policy and procedure in that she saw an offensive paper but did not tell anyone.

Sieger acknowledged that she interviewed Browne several times about the poster; Sieger knew that Browne did not put the poster on the wall. Sieger was not aware of any Union activity by Browne, whom she characterized as a quiet person who did not speak English very well. Sieger did not deny that she had refused Campbell's request to represent Browne and

[34] Browne has suffered from cataracts for years and has had blurry vision. She did not put her reading glasses on when she saw the paper.

Shaw during her investigation of the poster incident.

Browne testified that she did not recall being told that there was a rule prohibiting derogatory or offensive posters. She did not recall being given an employee handbook. She attended in-service meetings but these were to discuss the patients and infection control. She did not recall a meeting on April 25, 2007.

Browne testified that she had never been suspended or warned previously. Respondent showed Browne two warnings addressed to "E. Browne" dated 1994 and 1998. Browne could not identify them and Respondent did not produce any witness to connect these to the Elizabeth Browne who testified herein. Indeed, Browne said that there was an Evelyn Browne at Kingsbridge whose paychecks she sometimes receives in error.

On January 31, 2008 Browne was in the day room standing next to a patient she identified as Mr. Frazier. Brown testified that she was preparing the patient's meal by cutting up his meat, buttering his bread and fixing his drink. Mr. Frazier was able to feed himself and Browne has never fed him. Browne was holding her cell phone but when she saw Seiger and Sacramed at the door, she closed the phone and put it in her pocket. Sieger came over to Browne and instructed her to have her picture taken. Browne said she would first speak to her Union representative. Sieger responded, "You work for me, not the Union." Sieger repeated her request that Browne take a picture, but Browne continued to refuse. Sieger made no comment about Browne's cell phone and she said nothing about the patient. Browne testified that it is common to stand while cutting a patient's food.

Browne testified that she carries her cell phone to work every day; a majority of CNAs bring their cell phones to work. Browne knows that it is against the rules to use a cell phone while providing patient care, but while she was with Mr. Frazier she was expecting a call.

On February 5, 2008 Browne was called to the office of the Director of Nursing Chua. Nursing Director Guerrero and Union delegate Worrell were there. Browne was given three warning notices and she was terminated. A warning notice called a "2nd suspension" was for "standing while feeding the resident in the dayroom … a violation of our policy and procedure and violation of safety rules." Beneath this statement Brown wrote that she was going out to lunch and was fixing the Mr. Frazier's lunch; the patient eats by himself. Another warning notice called a "final warning" was because Browne refused to have her picture taken to update her file, an instance of insubordination. Browne wrote that she already had a picture in her file. The third notice, for which "termination" was the penalty, was because Browne "was observed by Mrs. Sieger using her cell phone while feeding resident in the dayroom." Browne wrote at the bottom that she was not talking on the phone.

Sieger testified that on January 31 she went up to Five-West after hearing that all the employees on that unit refused to have their pictures taken. Sieger wanted the pictures because during a strike the State Department of Health would be combing through the files and these had to contain employee photographs. Sieger stated that as she entered the day room she saw Browne standing up while feeding a resident in the day room. In fact, Sieger said, Browne was standing and shoveling food into the patient's mouth. Although the patient's mouth was full, Browne continued to shovel the food. Sieger stated that Browne's action was a violation of the safety code and the health code. Sieger characterized this as a serious violation; the rule requiring an employee to be seated while feeding residents is due to the fact that they choke very easily. Sieger testified that Browne's cell phone rang while she was feeding the patient and Browne spoke on the phone while continuing to shovel food into the patient's mouth. Sieger stated that she called Browne out of the day room and asked her

whether she knew she could not talk on the phone while on duty. Sieger also asked Browne why she did not want her picture taken and Browne replied that she did not want to because she already had a picture ID. Sieger testified that all the employees eventually agreed to have their pictures taken.

On cross-examination Sieger stated that she did not report Browne's improper feeding technique to the State Department of Health because there was no "outcome." Sieger enlarged on her description of the incident and stated, for the first time, that while Browne was shoveling food into the patient's mouth he was gagging and she was shoveling it back. Sieger stated, "It's an outrage. This is abuse" and that she was "shocked" to see Browne feeding a resident with one hand and talking on her cell phone with the other. Sieger maintained that she was certain that other employees have been disciplined for using cell phones while working.[35] I note that evidence of such discipline should have been produced in response to the General Counsel's subpoena but that no documents bearing on this issue were produced despite repeated admonitions during the proceeding. Sieger did not explain why the disciplinary notice given to Browne made no mention of the alleged shoveling of food nor of the patient gagging.

Senior Director of Nursing Roselyn Sacramed testified that she observed Browne using her cell phone and standing while feeling a resident. Browne immediately turned off her cell phone saying, "I'll call you back." Sacramed stated that she saw Browne holding a spoon and this fact showed that Browne was feeding a resident. An independent feeder holds his own spoon and if Browne held the spoon that meant the resident needed assistance. Sacramed did not recall which resident Browne was feeding nor did she state that she had any personal knowledge of the resident's abilities. On cross examination Sacramed stated that there was no negative outcome as a result of Browne's feeding of the patient. It would be her duty to report neglect or abuse but she did not report Browne to the State and there was no discussion on whether such a report should be made.

e. Toma Beica

Toma Beica worked as a porter assigned to cleaning duties on floor Two-West.[36] His supervisor was Tony Szereszewski. Beica participated in the informational picketing conducted in front of the facility in November and December 2007.

On January 23, 2008 the head nurse asked Beica to help transport a patient to the fourth floor. Beica helped the nurse by pushing the wheelchair. Beica, the nurse and the patient proceeded to the fourth floor, but when they arrived the head nurse on that floor refused to take the patient. Beica, the nurse and the patient then returned to Two-West. After this, Szereszewski asked Beica what he had been doing and Beica explained that the nurse had asked for his help. At Beica's suggestion Szereszewski confirmed this fact with the head nurse.

On January 24 a housekeeping employee named Shawn Peebles was assigned to buff the floor of Two-West. Beica testified that the proper procedure for buffing is in the following

[35] Respondent's handbook provides that "staff members are not permitted to make or receive personal calls during work hours, except in emergency situations, and only with knowledge and permission of a supervisor."

[36] Beica was employed at the facility from April 23, 1999 to January 28, 2008. Beica is from Romania; he testified without an interpreter. Beica speaks English with an accent and I observed that he was not too comfortable using the English language. Beica was unable to understand complicated phrases in English.

order: sweeping, mopping with soap and water, buffing with a machine, sweeping with a dust mop to collect dirt from corners and edges. After Peebles finished buffing the floor Beica told him to use the dust mop. According to Beica, Peebles replied, "Fuck you. It's not my job. You have to do that." Beica replied that Peebles was young enough to be his son and that he should not curse. Later that day Beica reported the incident to Szereszewski who told him not to worry and that he would speak to Peebles.

Shawn Peebles testified that he buffed the floor on Two-West twice a week.[37] Although a porter would normally help Peebles mop and sweep before he did the buffing, Peebles said that Beica never helped him do anything. Peebles stated that during the incident on January 24 Beica pointed his finger and said, "Do that, do that." Peebles said Beica called him "boy," and followed him around correcting his work and threatening to have Peebles fired. Peebles is black and he told Beica that he had used a racial insult. Beica replied, "Fuck off." Peebles said he got mad and he told Beica, "Fuck off, leave me alone." Peebles testified that he often heard Beica yell and curse at patients, and curse and scream at the staff. Further, Peebles stated, he overheard Beica in a conversation with others refer to Sieger as "asshole" and "bitch." Peebles testified that he prepared a statement about the January 24 incident which he gave to Perles. The statement reads as follows:

> On Thursday January 24, 2008 I, Shawn Peebles, worked on the 2nd floor west building. The porter on the floor, Toma Beica, started to make racial remarks to me by referring to me as boy and harassing me about working telling me I'm doing my work wrong and how he will falsely report me and get me fired. Every time I work on 2-west he stops doing his work and goes over every little thing I do. I just want an end to every thing he is doing. I spoke to Mr. Toma before but he continues to harass me and make racial remarks towards me. I just want him to stop.

On January 28 Beica was called to Perles' office with a Union delegate. Perles told Beica he was being terminated and handed him two warning notices. Each of the notices listed "termination" as the discipline being imposed. The first notice stated:

> On 1/23/08 Mr. Beica angrily yelled at his Director and cursed the operator of the facility after being asked a simple question. Mr. Beica used vulgar and extremely derogatory language in front of residents and other employees directed at another employee of the facility.

The second notice stated:

> On 1/24/08 it was reported by another employee that Mr. Beica was making derogatory and racial remarks towards him on the unit. Employee was harassed throughout the shift making a very hostile work environment.

Perles testified that he made the decision to terminate Beica. Perles said that his decision was based on a policy that an employee guilty of harassment faces immediate termination. He investigated the incidents leading to the termination by speaking to Peebles, Szereszewski and "people on the floor." Perles did not speak to Beica as part of his investigation; when he called Beica to his office the decision to terminate had already been made. As stated above, Szereszewski did not appear in response to the General Counsel's subpoena. Respondent did not call the people on the floor to testify about the incident.

[37] Peebles was employed by Respondent from an unspecified date in 2007 to May 2008.

After he was given the two notices and informed that he was terminated, Beica told Perles that he did not do what he was accused of doing. He had not cursed the operator. In fact, Beica told Perles, it was Peebles who had cursed him. Beica had no prior warnings on his record.

f. Sheila Jolly

Sheila Jolly worked as a CNA at Kingsbridge for 20 years until she was terminated on January 29, 2008.[38] Her shift on floor Six-East was from 11pm to 7am. Beginning in the summer of 2007 Jolly was a member of the Union committee that carried information from the unit employees to Wray-Roach after the latter was denied access to the building. Jolly met with Wray-Roach on the sidewalk across the street from the facility. Jolly transmitted information and literature from the Union to the unit employees in the building.

Jolly testified that although there was a notice on Six-East that employees could not bring their cell phones, she saw employees including registered nurses and licensed practical nurses using cell phones on the floor. Jolly, like most of the other employees, used her cell phone but she was never disciplined for cell phone use.

Jolly testified that in early 2008 she was asked by the Union to gather the night staff and request a meeting with Sieger. On January 8 Jolly and 22 or 23 other employees went to the lobby at 7:15 am after the end of their shift. The employees stood against the wall of the lobby while Jolly entered the nursing office and left a message asking Sieger to meet with them. Jolly gave her name to the supervisor on duty and said she and the rest of the employees would meet with Sieger at her convenience. The employees then proceeded to sign out in a book used for that purpose which was located about 2 ½ feet from the reception desk.

Jolly stated that as she was leaving the lobby she noticed that the receptionist, Nadine Boyce, was holding a telephone and staring at her. Jolly asked whom she was speaking to and whether it was Sieger. Boyce said she would not tell. Jolly then asked if Boyce would call Sieger so that she could speak to her. Boyce flew into a rage, she raised her voice and waved her hand at Jolly. When Jolly asked why she was angry, Boyce refused to tell and she slammed the phone down. Jolly testified that some other unit members were still in the lobby waiting to sign out. [39] Jolly then left the facility.

Sieger held the requested staff meeting on January 29 at 11.50 pm. Sieger told the employees she knew that they planned to strike. She said a supervisor would take the names of those who intended to strike so that she could replace them during the strike. Sieger blamed the Union for the strike; she said she had paid the bills and the Union was to blame for the loss of health benefits. One employee said the Union was telling a different story and asked why the lawyers could not attend the meeting so that employees could hear the facts for themselves. Sieger did not agree to this request. After the meeting, Jolly returned to work.

Later on the same evening, Jolly was called to Sieger's office. Sieger, Loida Chua and a Union delegate were present. Sieger told Jolly that Boyce had filed a grievance against her. Sieger read the grievance to Jolly and Jolly told Sieger that it was a lie. Then Sieger handed

[38] For the first five years, Jolly worked at the facility through a temporary agency, and then she was placed on staff.

[39] Boyce resigned from the Union on January 9.

Jolly a termination notice which read as follows:

> On Jan 8, 2008 approx. 7:15 am, you gathered night staff, surrounded the receptionist. You were intimidating, yelling and demanding that she call Mrs. Sieger, pointed a finger. Demanding that you want a signed contract in a very threatening tone. (sic)

Jolly told Sieger she should ask the night shift whether Boyce's statement was a lie, but Sieger replied that she had already investigated. Jolly testified that no one from management had asked her about the incident before she was terminated. Jolly denied that she had gathered the night crew around Boyce, that she had pointed a finger at Boyce, that she had raised her voice or that she had demanded a signed contract.

After she was dismissed from Sieger's office, someone escorted Jolly to get her purse and clear her locker and she was put out on the street at 2:30 am.

Boyce was deceased at the time of the instant hearing.

Respondent introduced several notices addressed to Jolly, the most recent of which was dated 2003. The notices dealt with complaints of "attitude", failure to answer a bell promptly, failure to clock out for meals, and the like. The General Counsel introduced Jolly's competency assessment forms dating from 1993 through 2007. In 2007, Jolly was rated proficient in all her skills and above average in meeting standards. In all other years, Jolly was rated proficient and above standards or at the standards. In 1997 her supervisor said Jolly was, "hard working, always involved in her assigned residents and cooperative with staff and charge nurse." In 2005 her supervisor described her as "Assertive and reliable; very punctual in reporting for work."

Sieger testified that she makes it a practice to meet with employees at their request. In the weeks before the strike groups of employees came and asked her to meet with them and she complied.

Sieger testified that Jolly was discharged for the reason stated in the termination notice. She said when Boyce described her exchange with Jolly on the morning of January 8th she asked Boyce to write a statement. Then she went to the security camera to view a tape of the morning's events in the lobby. Sieger testified that the video confirmed what Boyce had told her. Sieger discussed the incident with Chua and Perles but she did not speak to Jolly before she decided to discharge her. Sieger made the decision to terminate Jolly based on the videotape. Sieger testified that the decision to fire Jolly was not based on what Boyce told her. She said of the incident, "I saw it on the video." Sieger testified that Jolly violated the policy against harassment. Sieger claimed not to know which policy she was referring to.

The General Counsel's subpoena required production of this videotape; it was not turned over by Respondent and no explanation for the failure to produce the videotape was offered by Respondent. No motion to revoke the subpoena with respect to the tape was filed. Respondent was informed several times that evidence would be precluded from being introduced if the subpoena was not honored. The tape should have been turned over pursuant to a direction given at the hearing on November 19, 2008. Subsequently, I ruled that I would disregard Sieger's testimony about what she saw on the videotape and what Boyce told her about the incident due to Respondent's failure to produce the videotape as required by the subpoena. I also rejected Boyce's written statement about the incident for the same reason. Sieger testified that she made her decision to fire Jolly based on what she saw on the videotape, the videotape was therefore the best evidence of what Sieger saw. However, Respondent refused to provide

the tape at the hearing. *Bannon Mills, Inc.*146 NLRB 611, 633 (1964). ("If the best evidence which could have been offered on this issue is not before us, responsibility therefore rests with Respondent who refused to honor a subpoena by the General Counsel for its production.")

Respondent called Donald Boyce, the widower of Nadine Boyce, to testify about what she told him concerning the incident on January 8. As discussed at the hearing, I have decided to strike Donald Boyce's testimony because Respondent failed to turn over the videotape of the incident in compliance with the General Counsel's subpoena.

10. Interrogation About Employees' Strike Intentions

Three employees testified that two weeks before the strike Dietary Director Jan Dziekonski called a number of employees to his office. I credit the uncontradicted testimony of Kazimierz Zelazek, Mariusz Przygoda and Wladyslaw Chichon concerning this event.[40] Dziekonski spoke to the Polish speaking employees, including Zelazek, Przygoda, Chichon, Stanislaw, Jozef, Pawel, Darek and Julian Marut. Dziekonski asked the employees whether they were planning to join the strike. He said he had to know by the next day.

Toma Beica testified that in December 2007 Szereszewski asked a number of Polish speaking employees whether they intended to join the strike. Orlos translated his question from Polish to English for Beica's benefit. Beica replied that if it became necessary he would go on strike.

11. Videotaping of Picket Lines During the Strike

Several witnesses gave uncontradicted testimony that Respondent's agents videotaped the striking employees on the picket line during the strike. Wray-Roach testified that from the first day of the strike uniformed security guards videotaped the striking employees. The guards stood in front of the facility and pointed cameras straight at the strikers. The filming stopped after about three months when a new security guard company appeared. Wray-Roach's testimony was corroborated by witnesses Julian Marut, Wladyslaw Chichon, Noeller Worrell, Wojciech Orlos and Pansy Shaw.

Various witnesses also testified about the presence of security cameras affixed to the outside of the facility. Counsel for the General Counsel attempted to show that Respondent added security cameras to the building and repositioned existing cameras in order to observe the Union activities of its employees. I have concluded that these witnesses gave unreliable testimony. The witnesses had trouble remembering which were the old and which were the new cameras and when the cameras had been installed. Moreover, the testimony of the various witnesses was inconsistent and confused. I shall not make any findings based on testimony about security cameras attached to the building.

12. Negotiations for a Collective-Bargaining Agreement

Michael Rifkin is the current Executive Vice-President and Nursing Home director of 1199, SEIU.[41] Rifkin testified that Respondent did not execute the Memorandum of Agreement (MOA), that extended and modified the 2002-2005 collective-bargaining agreement between the Union and the Greater New York Healthcare Facilities Association. This MOA was executed on

[40] Respondent did not call Dziekonski to testify herein.

[41] Rifkin apparently replaced Jay Sackman .

June 4, 2005; it had an effective term from June 1, 2004 to April 30, 2008. A second MOA executed on July 5, 2007 between the Union and the Association continued and modified the collective-bargaining agreement with an effective date from May 1, 2007 through April 30, 2011. Respondent did not execute the second MOA.

Sieger testified that she and Attorney Joel Cohen conducted the negotiations for the successor to the contract expiring in 2005. Sieger attended all the sessions. Her position was that she wanted only one change in the Association contract; she wanted a "random arbitrator" instead of a named impartial chairman.

The documents relevant to the case before me start with a notice to employees sent by Sieger to "All Employees" on October 31, 2006.[42] As set forth in Judge Fish's Decision, this was subsequent to the Settlement Agreement before him and after Respondent had resumed its practice of making late payments to the Benefit Funds. The notice stated:

> This letter serves to advise that we have conceded on all issues with regard to the Union contract except for the Arbitrator. It is our position that we are entitled to choose from the American Arbitrators Association (sic) (AAA) for any arbitrator.
>
> This is the only outstanding issue with regard to signing the contract with 1199.
>
> Kindly demand from the Union their position in writing. Also how they can attempt to force Kingsbridge to accept their choice, Mr. Scheinman.

On November 13, 2007, following the termination of the employees' health benefits by the Funds, the Union sent a notice to Kingsbridge pursuant to Section 8(g) of the Act that employees would conduct informational picketing at the facility on their own time on November 28, 2007.

Rifkin testified that he met with Sieger at her request in November 2007. The Union had already conducted the strike vote at Kingsbridge. Rifkin recalled that he and Sieger discussed the negotiations for a new collective-bargaining agreement. Sieger said the only issue was the selection of a contract arbitrator. Rifkin agreed to Sieger's request that the American Arbitration Association be named instead of an identified permanent arbitrator. He said he would send Sieger a memorandum of agreement (MOA).[43]

Rifkin testified that Sieger's main concern during this meeting was to replace Scheinman as permanent umpire with the AAA. She also told Rifkin that the Union was making the people strike. Respondent was still seeking a payout agreement from the Greater New York Benefit Funds. Sieger asked him to get her favorable terms from the Funds. Rifkin explained that he did not control the Funds. Rifkin testified that after he and Sieger agreed on naming the AAA and they had a deal, he told Sieger that he would "look into" the Benefit Fund problem." Rifkin did not say he would work out a payment arrangement for the Fund contributions.

Sieger testified that at this meeting she told Rifkin she wanted the AAA to appoint arbitrators for disputes under the collective-bargaining agreement, but Rifkin told her she did not

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[42] Sieger testified that at a staff meeting the employees had asked why there was no collective-bargaining agreement and they requested that she put her position in writing.

[43] Although Rifkin testified that he sent such an MOA, he could not produce it and I shall make no findings concerning this purported document.

have a choice. Sieger also recalled that Rifkin said he had spoken to New York State Attorney General Cuomo about her and that the State would appoint a receiver for Kingsbridge.[44]

On December 7, 2007 The Union sent Kingsbridge another 8(g) notice stating that the employees would conduct informational picketing on their own time on December 18, 19 and 22, 2007.

On December 11, 2007 Respondent's Attorney Joel Cohen wrote to Union Attorney Bluestein giving Respondent's position on the negotiations. Sieger testified that Cohen's letter stated her position on signing the Association agreement. Cohen's letter said:

> Helen Sieger has agreed since 2005 to sign the Greater New York contract except that she wants American Arbitration Association arbitrators to hear contract disputes, not the "Impartial Chairman", Martin Scheinman. That is the only issue that has kept the parties from signing a contract. Send Ms. Sieger the greater New York contract with the American Arbitration Association as arbitrator and she will sign the contract today.

Union Attorney Hanan Kolko replied to Cohen on December 17, explaining that the Union was under the impression that Respondent had previously taken the position that it would not participate in the Child Care Fund. Kolko also explained that the use of an Impartial Chair insured uniform interpretation of the collective-bargaining contract.

On January 7, 2008 Sieger again addressed a letter to "All Employees" confirming "our conversation of today's meeting at 5:00 P.M."[45] Sieger said:

> I agree to immediately sign the previously agreed upon contract with 1199, adding the American Arbitrators Association (sic) as the arbitrator instead of Martin Scheinman.

On January 21, 2008, the Union sent Kingsbridge a notice pursuant to Section 8(g) of the Act stating that employees would engage in a strike and picketing beginning at 6 am on February 20, 2008.

Rifkin replied to Sieger's January 7 letter on January 23, 2008. His letter stated:

> 1. 1199 is prepared to enter into an agreement with Kingsbridge Heights for the period June 1, 2004 through April 30, 2011 on the same terms as are contained in the June 1, 2004 through April 30, 2008 and May 1, 2007 through April 30, 2011 MOAs between the Union and the Greater New York Health Care Facilities Association, Inc.
>
> 2. 1199 is prepared to agree with you on one or more arbitrators each of whom is a panel member of the American Arbitration Association, to serve as Impartial Chairman (or Chairmen) under the agreement, in place of Mr. Scheinman.
>
> 3. Whether or not a collective agreement is entered into, health and other benefits cannot be reinstated until Kingsbridge pays, or enters into an arrangement satisfactory

[44] On February 11, 2009 a Caretaker was appointed by Judge Edgar Walker, New York State Supreme Court, Bronx County. The Caretaker has not sought to intervene in this proceeding.

[45] Sieger held meetings with employees on all three shifts to answer questions about why she had not signed a contract.

to the funds' Trustees to pay its indebtedness to the Funds, which is currently in excess of $2,600,000.

4. Irrespective of whether a collective bargaining agreement is entered into, the Union will pursue through all available means the collection of this indebtedness to the Funds, and to recover for the employees any benefits lost by virtue of the facility's delinquency.

5. As you know, 1199 has served Kingsbridge with a strike notice effective February 20, 2008 at 6:00 am. In the event 1199 is compelled to strike, it reserves the right to withdraw this offer.

Rifkin followed up with another letter to Sieger on January 25 reiterating his prior offer about replacing the impartial chairman and said, "[T]he only reason for your not signing a contract with 1199 no longer exists." He asked whether Sieger would sign the contract and avert the strike.

On January 25 Sieger again addressed the employees in a letter "To: 1199 Union Members." The pertinent paragraphs read as follows:

Mr. Rifkin says "1199 is prepared to agree with you on one or more arbitrators," I do not have a problem with Mr. Scheinman per se, I have a problem with 1199 denying my right to have a "**RANDOMLY**" chosen Arbitrator from American Arbitration Association.

Choosing an Arbitrator with 1199 who will rule on all cases involving the facility and 1199 is unjust and unfair. …

My position has not changed I will sign a contract if and when the Union agrees to the fair process of American Arbitration Association as the impartial chairman for all arbitration.

Rifkin wrote to Sieger on January 29 in response to her letter to the employees. He said that he had agreed to replace Scheinman as Impartial Chairman and taxed Sieger with refusing to sign the agreement. Rifkin further wrote that he was forwarding the industry agreement and said "If you wish to avert a strike on February 20th, sign the Memorandum of Agreement." There was nothing in this letter about making up delinquent contributions to the Funds.

Sieger replied on January 30 saying that Respondent's proposal "is to use the American Arbitration Association for arbitrations, not 'one or more arbitrators' who also are on an AAA panel as permanent arbitrators." Sieger added, "If you want to work out terms for payment of 1199 fringe benefit fund contributions … please let us know. [A]t no time did we intend to drop our proposal that we negotiate new payment terms."

The parties continued their communications to employees. In the beginning of February the Union distributed to the employees a form of "Settlement Agreement" signed by Rifkin and with a blank space for Sieger's signature. Rifkin testified that the employees had given the form to Sieger, but Sieger testified that the form was faxed to Kingsbridge. The document read:

1199-Kingsbridge Nursing Home Settlement Agreement

This dispute should be settled right away, for the benefit of workers, residents and management.

Therefore

If Kingsbridge Heights Nursing Home agrees to number 1 and 2 below, the Union will agree to number 4 and 5 below[46]

The Agreement

1. Kingsbridge heights Nursing Home agrees to the contract terms of the 6/1/04-4/30/2011 contract between 1199 SEIU and Greater New York Healthcare Facilities Assoc. which covers most NYC 1199 Nursing Home members.

2. Kingsbridge Heights Nursing Home will pay, prior to February 20, 2008, all delinquencies owed to the Greater New York Funds and agrees to continue the Benefit Fund in the new contract.

3. 1199 agrees with Kingsbridge Heights Nursing Home's request to have the American Arbitration Association and therefore will accept arbitrators admitted to the National Academy of Arbitrators from a panel provided by the American Arbitration Association under its labor arbitration rule.

4. 1199 agrees that if Kingsbridge Heights Nursing Home agrees to number 1 and 2 above, 1199 will withdraw the 1199 strike notice as soon as Ms. Sieger signs a full contract that includes 1 and 2 above.

Sieger testified that until she received this document in early February she had no idea that the terms of the Association contract was from 2004 to 2011. she accused the Union of suddenly asking for a "retroactive" agreement.

Beginning on February 18, 2008 the Federal Mediation and Conciliation Service tried to arrange a meeting between Respondent and the Union. On February 18 Commissioner Kathy Murray Cannon wrote to Perles and Rifkin requesting that the parties meet on February 19. Respondent's attorney Cohen told the Union that Sieger would not meet with the FMCS because she was busy preparing for the strike. Cohen refused to appear at a meeting without Sieger. On March 1 John Sweeney, Director of the Northeast Region of the FMCS, called a meeting of the parties to be held on March 7. The Union informed Sweeney that it would attend the meeting and would be prepared to compromise. Cohen replied that he would be out of the country that day. The Union offered to meet prior to March 7. The Union also suggested alternatives: another lawyer from Cohen's firm could attend on March 7 or the parties could meet on March 7 without counsel. On March 6, when it became clear that no meeting was being scheduled, Sweeney wrote to the parties requesting dates when they would be available to meet and attempt to end the ongoing strike.

On March 6, 2008 Rifkin wrote to Sieger enclosing the Greater New York Health Care Facilities Association collective-bargaining agreement expiring April 30, 2011 which Kingsbridge could adopt as an independent employer. Also enclosed was an additional Memorandum of Agreement to be executed by Kingsbridge and the Union which provided:

[I]n lieu of the Impartial Chairman named in Exhibits A and B, any dispute between the parties shall be submitted to arbitration before an arbitrator selected from a panel of

[46] Another version of this form is corrected so that it refers to "number 3 and 4 below."

arbitrators provided to the parties by the American Arbitration Association in accordance with its voluntary Labor Arbitration Rules.

Rifkin's cover letter to Sieger said:

> All you need to do to bring this strike to an end is to sign the enclosed Memorandum of Agreement and to make immediate arrangements with the Benefit Fund to pay your Benefit Fund delinquency, so that the health benefits of our members can be reinstated. Any other issues that remain with respect to outstanding obligations of the facility to the workers and the other funds can be resolved through further discussion. Failing resolution, these issues can be referred to arbitration in accordance with the memorandum of agreement.
>
> I urge you to sign the Memorandum of Agreement and make the necessary arrangements with the benefit Fund for the payment of the facility's delinquency so the facility, its residents, and our members can move beyond this unfortunate strike.

On March 14, 2008 David Jasinski, Esq., wrote to Rifkin saying, "We have been retained to represent Kingsbridge … in this matter. Please send all future correspondence to me directly." Jasinski went on to make a series of proposals to the Union "based on the changed circumstances – including, but not limited to, the strike and the Union's recent unilateral termination of the employees' health benefits." In addition to the utilization of the AAA for contract disputes, Jasinski made three new proposals. These were

> The length of the contract will be three years upon ratification
>
> Kingsbridge is forced and will provide health coverage to the employees and will no longer participate in the Fund due to the Union and the Fund's unilateral decision to terminate benefits
>
> Kingsbridge will have the right to offer no-frills package to those employees who voluntarily elect to participate in this program. Those employees will receive an additional $2.00 per hour to their base hourly rate.

On March 20 Rifkin replied to Jasinski stating that the Union had accepted Sieger's offer in writing and that the Union believed that an agreement had already been reached but Sieger had unlawfully refused to execute it. However, Rifkin offered to meet with Respondent and the FMCS "without prejudice to the Union's position that an agreement has already been reached."

Jasinski replied on March 25 denying that the employees were engaged in an unfair labor practice strike and denying that the parties had reached an agreement. Among other allegations, Jasinski for the first time in the parties' dealings, raised the argument that Respondent had never agreed to a retroactive contract beginning in 2004. Jasinski wrote that "Kingsbridge has successfully weathered more than one month of the unlawful strike" and asserted that "Kingsbridge is free to secure contract terms that it deems beneficial under these circumstances." He concluded, "We are willing to meet with the Union in good faith, but we are hindered by the Union's untenable positions. Unless the Union rescinds this position, and can come to the bargaining table with the intent to bargain a contract in good faith, any future bargaining will be futile."

Following this exchange of letters the Union and the FMCS attempted to schedule meetings between the parties. The Union wrote to Jasinski on March 26 seeking a meeting

under the auspices of the FMCS, a request that was echoed by Sweeney in a letter to the parties that same day. The Union agreed to meet on seven dates between March 26 and April 4, but Kingsbridge did not respond. By letter of April 3 Sweeney "officially" called a meeting for April 16. The Union agreed to attend on April 16, but Kingsbridge did not respond to the FMCS notice.

On April 11, 2008 the New York State Employment Relations Board initiated a series of attempts to arrange a meeting between the Union and Kingsbridge. These efforts continued to April 28, but despite the Union's willingness to meet, the Respondent never consented to such a meeting. The Chair of the State Board wrote that despite several calls to Perles and Kaminski she had gotten no response to her request for a meeting and she then scheduled a meeting for April 22. The Union agreed to be present on that date; however no meeting was held. The Union then agreed to be present at another meeting called by the State Board on April 29 but that meeting did not take place. The Union and Respondent never met for negotiations during the strike.

On May 6, 2008 Sieger wrote to Kolko "proposing that Kingsbridge Heights Rehabilitation Care Center will procure its own Pension Plan for its employee (sic) instead of the 1199 Pension Plan."

Kolko replied to Sieger on May 13 stating that, "the parties have already reached agreement on the terms of a new collective bargaining agreement" but that the Union is willing "without prejudice" "to sit down and engage in fact to face discussions with Kingsbridge in an effort to resolve any differences between the parties." Kolko concluded by asking Sieger to contact him if she wished to meet with the Union.

As stated above on August 14, 2008, pursuant to Judge Cote's Order, the Union made an unconditional offer to return to work on behalf of the unit employees and they were reinstated. Also pursuant to Judge Cote's order, on August 14 Rifkin wrote to Sieger as follows:

> I hereby request a meeting at the earliest possible date for the purpose of collective bargaining with respect to the wages, hours, and other terms and conditions of employees of the employees represented by 1999…. I direct your attention to my letter to you of March 6, 2008 and the Memorandum of Agreement referred to therein, which I believe sets forth the terms of an agreement already reached between the parties covering the aforesaid matters.

III. Discussion and Conclusions

A. Credibility of the Witnesses

I find that Wray-Roach was a credible witness. She displayed a good memory for the events and the sequence in which they occurred. In addition, Wray-Roach was a cooperative witness on cross-examination and did not seek to avoid answering the questions.

I find that Kervin Campbell was a credible witness. I observed that Campbell was forthright and cooperative. He did not seek to avoid answering questions on cross-examination. He recalled many events in great detail and in many instances his recollection was corroborated by the documentary evidence and by his affidavit given in December 2007. Campbell became confused during a lengthy cross-examination about the precise location of the cameras on the exterior of the facility and I shall not rely on that portion of his testimony. However, I am convinced that his recollection of the actual events he witnessed was accurate and honestly

rendered.

I find that Sieger was not a reliable or credible witness. First, Sieger resisted answering many questions; in a variety of instances she only became willing to acknowledge having a recollection about a subject when confronted with a document or fact that made ignorance impossible to maintain. For example Sieger twice testified that Jasinski represented her for a very limited time and for the sole purpose of dealing with a decertification petition filed on March 6, 2008. The hearing was noticed for March 17 but was postponed. It was only after being shown a charge in 2-CB-21511 signed by Jasinski on March 25, 2008 that Sieger acknowledged that he still represented her on that date and for that new matter. Then Sieger was shown Jasinski's letter of March 14, 2008 to Rifkin announcing that he had been retained to represent Kingsbridge and transmitting the new contract proposals set forth above in the section describing the negotiations. At this point, Seiger agreed that Jasinski represented Respondent for negotiations as well. Finally, Sieger admitted that Jasinski represented the facility "a lot further than March."

Second, Sieger professed ignorance about many details of the day to day operations of Kingsbridge. Although she described her duties as requiring her to oversee the operations of the facility and the department heads, she could not describe the duties of the Director of Nursing nor could she say whether the Assistant Director of Nursing could issue discipline on her own authority. When questioned about her testimony that employee Sheila Jolly was fired for violating a policy against harassment, Sieger claimed not to know which policy she had just testified about.

Third, Sieger refused to answer questions. For example, when asked who made the decision to discipline Orlos for failing to report seeing the poster on Five-West, Sieger said it was not a decision and then she claimed that no one made the decision, and that she could not recall who made the decision. This testimony was given in the face of the fact that Sieger wrote the disciplinary notice, interviewed Orlos when the incident was investigated and was present when he was given the disciplinary notice. Similarly, although Sieger admitted interviewing Shaw about the poster on the wall and she admitted interviewing both Shaw and Albert Spekman about his letter, Sieger tried to distance herself from the warning and discharge of Shaw by naming Chua, Shaw's department head, as the person who had the ultimate responsibility for the actions taken against Shaw. I note that Chua did not speak to Spekman and was not called to testify by Respondent.

Finally, Sieger's testimony is contradicted in numerous instances, discussed below, by the testimony of credible witnesses and by the documentary evidence.

Additionally, I note that Respondent did not comply with many of the requests in Counsel for the General Counsel's subpoena duces tecum. Although it was clear that Counsel for Respondent made repeated good faith efforts to encourage Sieger to produce the documents requested by the subpoena, she often did not comply and she offered no reason for her failure to comply. Time after time during the hearing, documents that were clearly encompassed by the subpoena were produced only after the General Counsel's case on direct was concluded and when Sieger was testifying and the documents would aid Respondent's presentation. I rejected these documents. Many documents and certain videotapes relevant to the proceeding were never produced and no reason whatever was given for the failure to provide them in response to the subpoena. It was clear to me that Sieger, Respondent's representative in the instant litigation, had not thought fit to secure full compliance with the Government's subpoena duces tecum.

I have decided that Perles was not a reliable witness. His testimony was contradicted by witnesses whom I have found to be credible and his testimony leads me to conclude that he shaded his testimony to favor Respondent.

I credit the testimony of Albert Spekman. Spekman, a disinterested witness in the instant proceeding, was cooperative on cross-examination and answered each question fully. From my careful observation of him as he testified and from the testimony itself, I conclude that Spekman is a dedicated New York City managerial level civil-servant who is active in local community affairs. He had no motive to shade his testimony herein. He freely praised the care given to his late mother by Kingsbridge and he displayed no partisan feelings relating to the instant case.

My credibility findings as to other witnesses will be discussed below in connection with the particular events relating to those witnesses.

Tony Szereszewski, the Director of Housekeeping and an admitted supervisor of Respondent, was subpoenaed by the General Counsel in this proceeding. Counsel for Respondent stated on the record that he had tried to secure Szereszewski's attendance at the hearing and actually expected him to appear, but he was told on the day of Szereszewski's expected appearance that the latter had left the country. Respondent did not produce Szereszewski at any time during the hearing. I therefore conclude that Szereszewski's testimony would not have been favorable to Respondent.

B. Violations of Section 8(a)(5)

1. Denial of Union Access

The 2002-2005 collective-bargaining agreement provides that "the representative of the Union servicing the facility … shall have admission … to discharge … her duties…." The Impartial Chairman's award construed this provision to require that the Union official desiring to meet with employees "shall ordinarily provide 48 hours notice" and "the Home shall provide a reasonable location for such meetings. It may be necessary to change the location to another reasonable location at the end of the shift if the meeting place is otherwise needed for another important business reason." The access provisions of the contract, as interpreted by the award, survive the expiration of the contract. *New Surfside Nursing Home*, 322 NLRB 531, 535 (1996). Indeed, until Perles assumed control of communicating with Wray-Roach about her visits to meet with unit employees, those meetings had been scheduled in accordance with the provisions of the award. Wray-Roach gave at least 48 hours notice of a requested visit and she was promptly advised whether the room was available. Wray-Roach testified that if the conference room became unavailable during a scheduled meeting, she would be offered the use of the social service office.[47] I credit Wray-Roach that an alternative location would be offered if the conference room had to be used for part of the day. This practice is in accord with the award of the Impartial Arbitrator. I do not credit Perles that the practice was not to offer another meeting room if the conference room was in use.

I credit Wray-Roach that on August 9 at 6:30 am when she arrived at the facility, she had received no response to her August 3 request to use the conference room. I credit Wray-Roach that Perles' letter denying her the use of the conference room on August 9 was received by her on the afternoon of the 9th. Respondent has offered no evidence to contradict this testimony.

[47] Both of these rooms are away from patient care areas.

Perles' letter denied the Union the use of the conference room on the ground that it was not available, yet when Wray-Roach used the room at 6:30 am it was not occupied. I credit Wray-Roach that she reminded Perles that Abrams had made alternate arrangements if he needed the conference room and that Perles replied that he did not want her in the building unless he was present because he wanted to monitor her. I do not credit Perles that Wray-Roach was verbally abusive during this exchange. Perles did not testify to any abusive statements by Wray-Roach; he quoted her as saying that he never made a room available and she had to speak to the members. These two statements are hardly abusive. If Wray-Roach had actually used abusive words or phrases to Perles he could not have failed to remember them when testifying about the conversation. Although Perles stated that he instructed Boyce to telephone the police, Perles did not testify that Wray-Roach refused to leave the building and he gave no justification for contacting the police to remove a Union official who had been in the conference room on many occasions. I do not credit Perles that Wray-Roach was yelling and screaming. I credit Wray-Roach that the conversation was not heated.

Perles did not deny Wray-Roach's testimony that she telephoned him twice after August 9 and left messages requesting a place to meet with employees. He gave no reason for failing to return her phone calls. Instead, on August 14 Respondent's attorney Cohen wrote to the effect that Wray-Roach had argued with Perles and had been abusive. Cohen did not specify any verbal abuse. Arguing with an employer about a denial of access does not amount to abuse and is not a reason to bar from the premises a Union official who has a long history of visiting a facility without incident. Cohen's letter stated that Respondent "will not make its facilities available for Union meetings." I find that this letter reveals the true motivation for Perles' actions; Respondent did not want the Union speaking to its employees on the premises. Kingsbridge was using a convenient pretext to bar any Union official from conducting contractually required meetings with its employees.

Nadine Boyce's five-day suspension and the threat to fire her for failing to bar Wray-Roach on August 9 is further evidence of Respondent's intent. Although there was no notice to Boyce on the morning of August 9 that Wray-Roach was not supposed to enter the building, Boyce was given a draconian punishment for permitting Wray-Roach access in the usual way.

I find that the Respondent violated Section 8(a)(1) and (5) of the Act since August 9, 2007 by refusing to grant the employees' collective-bargaining representative access to the facility in accordance with the applicable provisions of the parties' collective-bargaining agreement. *Gilliam Candy Co.*, 282 NLRB 624, 626 (1987).

2. Failure to Provide Information to the Union

It is well-established that an employer must furnish to the collective-bargaining representative of its employees information that is necessary and relevant to the performance of the Union's duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Wage and hour information concerning bargaining unit employees is presumptively relevant and must be produced to the Union. *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enf'd 347 F.2d 61 (3rd Cir. 1965).

Sieger's testimony makes it clear that none of the information requested by the Union was ever provided directly to the Union. Sieger testified only that some information was included in an accompanying report with payments to the various Funds. However, as recognized by the collective-bargaining agreement, the Funds are separate entities from the Union. After August 2007 when Respondent ceased making any contributions to the Funds

they were not given any information concerning unit employees.

Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with the requested information relating to unit employees, including date of hire, department, shift, status, rate of pay and the monthly schedules.[48]

3. Failure to Pay the Funds and Strike

The Complaint alleges that from August 9, 2007 through September 10, 2008 Respondent failed and refused to make payments to the Funds as they become due. Counsel for the General Counsel's Brief explains that although the allegations regarding Respondent's failure to make payments into the Funds are encompassed by those in the Judge Fish's case, 353 NLRB No. 69, the settlement agreement in that case had not yet been revoked when the instant charges were filed, the instant Complaint was issued and the 10(j) proceeding was commenced. Thus, the instant Complaint was drawn to allege conduct going back to August 9, 2007. Subsequently, Judge Fish's Decision and the Board affirmance were issued finding a failure to pay from August 9, 2007 through May 1, 2008.

It is undisputed that Respondent made no payments to the Funds from August 9, 2007 through September 4, 2008. Respondent thus violated Section 8(a)(1) and (5) of the Act. *Kingsbridge Heights Rehabilitation and Care Center*, 353 NLR B No. 69 (2008)

Respondent's Answer asserts that the 'Union unlawfully engaged in a strike … in whole or in part in support of its position" that Kingsbridge pay the delinquent Fund contributions as a condition of reaching agreement on the terms of a successor collective-bargaining agreement.

In determining whether a strike is an unfair labor practice strike or an economic strike, the Board looks to the "state of mind of the strikers" and their motivation. *C-Line Express*, 292 NLRB 638, 639 (1989). As long as an unfair labor practice has "anything to do with" causing a strike it will be considered an unfair labor practice strike. *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3rd Cir. 1972), cert. denied 419 U.S. 850 (1972). Even in the absence of direct evidence, "It is well established that a causal connection between the Respondent's unlawful conduct and the strike may be inferred from the record as a whole." *Child Development Council*, 316 NLRB 1145 (1995).

I credit Wray-Roach's uncontradicted testimony that employees told her that they wanted to strike because they had received notice that their medical benefits were being terminated. I credit the undisputed testimony that employees and Union officials discussed the termination notice at the October meetings before the strike vote and that employees carried signs stating "we need our benefits" and warning of the termination of health benefits. I credit the testimony of employees Seebaran, Jolly, Worrell, Campbell, Orlos, Beica and Marut that they voted to go on strike because they were concerned about the loss of their benefits.

The Board has found that Respondent violated Section 8(a)(1) and (5) by its failure to make required payments to the Funds from August 2007 to May 2008. 353 NLRB No. 69 (2008). I have found above that Respondent violated Section 8(a)(1) and (5) by failing to make required contributions to the Funds from May 1, 2008 to September 4, 2008. The failure to remit the payments caused the Benefit Fund to inform the employees on October 3, 2007 that it

[48] Although the Union also requested the social security numbers of employees the failure to provide that information is not alleged as a violation in the Complaint.

intended to terminate the employees' benefits as of November 3, 2007 and caused the actual termination of the benefits; the failure to make these payments caused the strike that began on February 20, 2008 to continue until the 10(j) proceeding was determined by Judge Cote's injunction. Therefore, the strike constituted an unfair labor practice strike.

Further, between the time the employees voted to strike in October 2008 and the day the strike commenced on February 20, 2008, the Respondent had committed the numerous additional unfair labor practices found below; among these I note that Respondent unlawfully videotaped the employees' informational picketing, Respondent threatened to discharge Union supporters, Respondent offered the employees yellow dog contracts and Respondent terminated employees because they engaged in concerted activities and supported the Union.

I conclude that the record amply supports a finding that the strike constituted an unfair labor practice strike.

4. Failure to Execute the Collective-Bargaining Agreement

Respondent's Answer denies that it reached agreement with the Union on a collective-bargaining agreement and denies that it refused to execute the agreement. Respondent asserts that the Union unlawfully conditioned agreement to the terms of a contract "on the Respondent accepting the Union's position on a nonmandatory subject of bargaining, namely the payment of delinquent fund contributions."

As discussed above, Respondent unlawfully failed to execute the 2002-2005 collective-bargaining agreement between 1199 and The Greater New York Healthcare Facilities Association and the Board ordered it to execute the contract and abide by its terms. 340 NLRB 650. Sieger's testimony herein establishes that she attended all the negotiations that she and Respondent's Attorney Cohen conducted on behalf of Respondent for the successor to the agreement expiring in 2005. Sieger's position as of October 31, 2006 was that she had agreed to a successor agreement, in effect that Kingsbridge would sign the Association contract as an independent employer, except that Respondent's contract would not name Scheinman as the impartial chairman but would use AAA procedures for arbitrations.

Sieger and Rifkin discussed the status of negotiations in November 2007 after the employees' health benefits had been terminated for lack of contributions to the Funds and after they had already voted to strike. Sieger told Rifkin that the only open issue in the negotiations was the choice of arbitrator. Sieger also asked Rifkin to get her a payment arrangement with the Funds and he said he would look into it.

Cohen wrote to the Union on Sieger's behalf on December 11, 2007 reiterating Sieger's stated position. He said she would immediately sign "the greater New York contract" if the AAA were named as arbitrator. Sieger reiterated this position to Respondent's employees on January 7, 2008 in a notice in which she agreed to "immediately sign the previously agreed upon contract with 1199" if Scheinman were replaced with the AAA.

Rifkin's unrebutted testimony makes clear, and I find, that the Greater New York Healthcare Facilities Association agreement is the document referred to by Sieger and Cohen. This document consists of the October 1, 2002 – April 30, 2005 collective-bargaining agreement supplemented by two Memoranda of Agreement (MOA). The first MOA had a term from June 1, 2004 to April 30, 2008. The second MOA, executed on July 5, 2007, was effective from May 1, 2007 to April 30, 2011.

On January 23, 2008 after the strike notice of January 21 had been sent to Kingsbridge, Rifkin wrote to Sieger. As set forth above, his letter stated that the Union would sign an agreement with Kingsbridge on the same terms as the Greater New York Healthcare Facilities Association. His letter also informed Sieger that even if a contract were signed, the employees' benefits could not be restored until the delinquencies to the Funds were paid. His letter further stated that collection of the delinquencies would be pursued whether or not a contract were signed between the Union and Respondent. This letter does not condition the signing of a contract on the payment of delinquencies to the Funds. Indeed, the letter makes clear that the signing of a contract and the payment of money owing to the Funds were two separate issues.

As detailed above, Rifkin and Respondent continued to communicate about the method of choosing arbitrators for disputes arising under the collective-bargaining agreement. Sieger insisted on a "random" arbitrator chosen from lists sent by the AAA under its labor arbitration procedures and she clearly did not want an impartial chairman. Cohen termed this proposal "the American Arbitration Association as arbitrator." The Union did not immediately agree to this precise condition and continued to emphasize what it believed were the benefits of a permanent arbitrator. By January 23, 2008 the Union agreed to replace Scheinman with another impartial chairman but this was rejected by Sieger on January 25 when she again insisted on a randomly chosen arbitrator from the AAA.

Rifkin's letters of January 25 and 29, 2008 made no mention of Fund payments; they repeated the proposal to replace Scheinman and asked Sieger to sign the MOA adopting the industry agreement. Sieger's letter of January 30 again rejected the idea of an impartial chairman. The letter also reiterated Respondent's demand for a payment plan for Fund contributions as requested by Cohen's August 27, 2007 letter. Sieger said "at no time did we intend to drop our proposal that we negotiate new payment terms."

The form of "Settlement Agreement" quoted above which was distributed to the employees in February before the strike is the basis for Respondent's claim that the Union was insisting on a permissive subject as a condition of signing a collective-bargaining agreement.[49] This "Settlement Agreement", proclaimed its purpose to avert the imminent strike and benefit the "workers, residents and management." The first two conditions to avert the strike were 1, signing the "Greater New York Healthcare Facilities Association contract" and 2, dealing with the delinquencies to the Funds and agreeing to continue the Benefit Fund in the new contract.

As to condition number 2, Respondent had not demanded to discontinue the Benefit Fund and the phrase about continuing the Fund was not addressed to any issue in the current negotiations. Condition number 3 contained a proposal to utilize only arbitrators admitted to the National Academy of Arbitrators. This was a new proposal and had never been discussed with Sieger; clearly, it did not meet Sieger's demand for randomly chosen arbitrators from the AAA. Number 4 presents the issue raised by Respondent's Affirmative Defense. Number 4 provides that 1199 will withdraw the strike notice if Respondent signs the Association contract and pays the Fund delinquencies. This is merely a repetition of number 1 and 2. The second part of condition 4 contradicts numbers 1 and 2; this clause refers to a "full contract" that includes 1 and 2. The Union had never proposed anything called a "full contract" and had never proposed to include provision for back payments to the Funds in the collective-bargaining agreement.

[49] Counsel for Respondent stated on the record that this document is "fairly central … it may be the most central question in the case."

It is clear that the so-called form of "Settlement Agreement" distributed to employees was prepared in a careless and haphazard manner to be used as propaganda in the weeks leading to the strike date of February 20. The form was internally inconsistent and made no sense when considered in the totality of the negotiations between the parties. The "Settlement Agreement" was not a serious bargaining proposal and I shall not view it as such. It was not mailed to Sieger or her attorney and it did not continue the bargaining proposals contained in the Union's prior formal communications with Respondent. Indeed, on March 6, 2008, about two weeks after the strike commenced, the Union did send a formal proposal to Respondent.

On March 6, 2008, the Union agreed to Respondent's demand that a named impartial chairman be replaced with the arbitration procedures of the AAA. Rifkin's March 6 letter and the enclosed Memorandum and collective-bargaining agreement took into account Sieger's and Cohen's oft repeated statements that Respondent would sign the contract if the AAA were named as arbitrator. Sieger had maintained this position beginning on October 31, 2006 and she had repeated it on January 7, 25 and 30, 2008. Cohen had stated this position clearly in his letter of December 11, 2007 when he said that Sieger had agreed since 2005 to sign the Greater New York contract and demanded, "Send Ms. Sieger the greater New York contract with the American Arbitration Association as arbitrator and she will sign the contract today." When Cohen wrote his letter on December 11, 2007 the Association and the Union had already executed the last MOA on July 5 extending the collective-bargaining agreement to April 30, 2011.

As set forth in full above, the Union's March 6 communication enclosed the Greater New York Health Care Facilities Association contract which Respondent would sign as an independent employer and a Memorandum replacing the Impartial Chairman with a procedure for arbitrators to be selected from panels provided by the AAA. The March 6 submission complied in every respect with the condition set forth by Sieger and by Cohen's letter of December 11, 2007. The March 6 submission constituted the Union's acceptance of the Respondent's repeated offers for a collective-bargaining agreement.

I note that Sieger testified that until early February 2008 she had no idea that the term of the Association contract was from 2004 to 2011 and in her testimony she accused the Union of suddenly asking for a retroactive agreement. However, Sieger had been aware of the term of the Association contract throughout the negotiations conducted by herself and Cohen from 2005. The evidence shows that Cohen, the expert and able labor law attorney who represented Kingsbridge vigorously until at least March 7, 2008, never objected to the effective date of the agreement.[50] I do not credit Sieger that the Union changed its position on the effective date of the agreement and I find that Respondent was aware at all times of the term of the contract.

There is no evidence in the record that Respondent's offer had been withdrawn. The parties had been in nearly constant communication in the weeks before March 6 while the FMCS tried to arrange a meeting to settle the strike. Neither Sieger nor Cohen had given any indication of a change in Respondent's longstanding position that it would sign the Association contract if the AAA were named as arbitrator.

Rifkin's cover letter of March 6 also dealt with the issue of the Benefit Fund delinquency which affected the health insurance of the employees. Although payment to the Benefit Fund, or the other Funds, was not made a condition of reaching a collective-bargaining agreement, the

[50] March 7 was the date on which Cohen stated he would be out of the country and for that reason unable to attend a meeting with the FMCS.

Union did condition the end of the strike on Respondent making arrangements to pay arrears to the Benefit Fund.[51] However, it is clear that the Union agreed to enter into the contract even if no arrears were paid to any Fund.

I find that on March 6, 2008 when the Union agreed to the use of the AAA labor arbitrators instead of a named impartial chairman in the collective-bargaining agreement the parties had a meeting of the minds and a contract was formed. *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). Jasinski's letter of March 14, 2008 which made new proposals on Respondent's behalf was an implicit refusal to sign the collective-bargaining agreement; his letter of March 25 explicitly denied that the parties had reached agreement. I find that Respondent refused to execute the collective-bargaining agreement reached by the parties on March 6, 2008 in violation of Section 8(a)(1) and (5) of the Act. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941); *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004).[52]

5. Failure to Meet with the Union

The Complaint alleges that since March 20, 2008 the Union has requested to meet with Respondent to discuss the collective-bargaining agreement and for the purpose of collective bargaining. The Complaint further alleges that the FMCS has requested that the parties meet by letters of February 18, March 1, 6 and 26 and April 3, 2008, and that the New York State Employment Relations Board has requested meetings by letters dated April 11, 15 and 28. The Complaint alleges that Respondent has refused all of these requests to meet and that on March 25, 2008 Respondent made regressive bargaining proposals and refused to meet with the Union unless it abandoned the collective-bargaining agreement reached on March 6.

The documentary evidence shows that Respondent refused to meet with the Union despite the Union's request on March 20 and that Respondent refused to schedule a meeting in response to requests from the FMCS dated from March 26 to April 3. The documentary evidence shows that the New York State Employment Relations Board made similar efforts but that Kingsbridge either refused to attend or ignored the requests to meet from April 11 to 28, 2008. Respondent offered no testimony at the instant hearing to explain Kingsbridge's refusal to meet with the Union at the request of the Union, the FMCS and the State Board. It requires no extended discussion to find that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to meet with the Union for the purposes of collective bargaining.

Further, Jasinski's letter of March 25 conditions meeting with the Union on its withdrawal of what he characterized as its "untenable positions"; he states that bargaining will be futile "unless the Union rescinds this position." In the context of Kingsbridge's repeated refusals to schedule meetings with the Union, it is clear that the failure of the Union to withdraw from the positions cited in the letter was Respondent's justification for refusing to meet. Jasinski's letter

[51] The Benefit Fund provides the employees' health insurance. The employees had voted to strike because they lost their health benefits.

[52] Although Respondent did not raise these issues, it is clear that the strike did not terminate Respondent's offer and that the passage of time did not preclude the Union from agreeing to Respondent's position and concluding a contract. Sieger's letter of January 30, her last communication about the contract, did not change Respondent's position on what would be required to achieve a contract. A time lapse of about 5 weeks is not unreasonable. *Chicago Tribune Co.*, 303 NLRB 682, 690 (1991); *enfd. denied on other grounds*, 965 F.2d 244 (7th cir. 1992). Nor would the strike vitiate Respondent's outstanding offer. *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989).

disputes the Union's assertion that the parties have reached a collective-bargaining agreement. I conclude that Respondent was refusing to meet with the Union unless it withdrew its claim that it had a contract with Kingsbridge. It is a violation of Section 8(a)(5) of the Act because it proposed to "hold future negotiations hostage to unilaterally imposed demands, and, absent impasse, such a condition is illegal even with respect to issues properly classifiable as mandatory subjects of collective bargaining." *Caribe Staple Co.*, 313 NLRB 877, 888 (1994).

Section 37(c) of the Complaint alleges that Respondent's overall conduct shows a refusal to bargain in good faith with the Union, citing Jasinski's letter of March 25, 2008, the failure to abide by the Settlement Agreement reached before Judge Fish, bypassing the Union, refusing access to the Union, failure to provide information to the Union, making unilateral changes, soliciting employees to sign a yellow dog contract and refusing to meet with the Union at the request of the FMCS and the State Board. Counsel for the General Counsel's Brief argues that Respondent engaged in surface bargaining. The Brief refers to Jasinski's letters of March 14, and 25 and Sieger's letter of May 6, 2008.

I have found above that the parties reached agreement on a collective-bargaining agreement as of March 6, 2008 and that Respondent has unlawfully refused to execute the agreement. The instant case was not tried as a surface bargaining case. Although it is true that some of the ancillary indicia the Board relies on in surface bargaining cases are present here, it is unnecessary to consider the surface bargaining allegation because the parties have indeed reached a contract and the appropriate remedy is to order the Respondent to execute the document and abide by its terms.

Respondent's Answer asserts as an Affirmative Defense that "Respondent and the Charging Party were at impasse in negotiations for a successor collective-bargaining agreement at material times to this proceeding." I have found above that Kingsbridge and the Union negotiated and exchanged contract proposals focused on the one issue dividing them, the identity of the arbitrator. I have found above that the Union accepted the Respondent's offer on March 6, 2008. Presumably, the defense of impasse is directed to Jasinski's letters of March 14 and 25, in which he made new contract proposals and announced Respondent's intention to make unilateral changes in health insurance and wages and to Sieger's letter of May 6 which expressed the same intent. I do not find that an impasse existed in the collective-bargaining negotiations between the parties.

6. Reimbursement of Union Dues

It is well established that an employer does not violate the Act when it discontinues the checkoff of union dues following the expiration of its collective-bargaining agreement with the Union. *Bethlehem Steel Co.*, 136 NLRB 1500, 1501 (1962). But it is also permissible for an employer to continue to honor unrevoked checkoff authorizations after the expiration of the contract. *Frito-Lay*, 243 NLRB 137, 139 (1979). Sieger's testimony establishes that Respondent continued to deduct dues and remit them to the Union from the expiration of the collective-bargaining agreement on April 30, 2005 until October 2007 when she was purportedly told that the continuing deduction was unlawful. I note that Sieger did not state the precise source of this incorrect information. Respondent calculated the amount it would reimburse each employee for one year's worth of Union dues based upon the dues collected from the individual employee for the period from October 2006 to October 2007. Respondent did not assert that it had given the Union notice and an opportunity to bargain over the dues reimbursement. Because the dues had originally been deducted as 2% of each employee's gross weekly pay, the effect of Respondent's reimbursement was to create a retroactive wage increase of 2% for the period October 2006 to October 2007. Respondent thus made a unilateral change in the

wages of the employees in violation of Section 8(a)(1) and (5) of the Act.

7. Bypassing the Union, Dealing Directly with Employees and Individual Contracts

I credit Kervin Campbell that at a staff meeting in August 2007 Sieger said she had heard that the employees' benefits would be terminated and she offered the employees $450 per month for medical coverage. I credit Campbell that this occurred after Wray-Roach was no longer allowed access to the building. In this instance Sieger was communicating directly with employees regarding terms and conditions of employment. Sieger did not discuss this offer with the Union. No extended analysis is required to find that Sieger's offer violated Section 8(a)(5) of the Act. The General Counsel has shown that Respondent was "communicating with its represented employees and that the discussion [was] for the purpose of establishing or changing the wages, hours, and terms and conditions of employment" and the communication was "to the exclusion of the Union." *Southern California Gas Co.*, 316 NLRB 979, 983 (1995).

Sieger and Perles testified that Respondent offered the unit employees individual contracts that defined their terms and conditions of employment if they resigned from the Union. Sieger and Perles dealt directly with the employees after obtaining proof that they had left the Union. Although Respondent did not produce the actual signed contracts, both Perles and Orlos testified that some employees had signed the contracts. Respondent violated Section 8(a)(5) and (1) by dealing directly with the employees to establish wages, hours and terms and conditions of employment by means of individual contracts.

The contracts offered to the unit employees required them to refrain from becoming "a member of any union … throughout the duration of this agreement." Respondent violated Section 8(a)(1) of the Act by offering individual contracts to employees which required them to refrain from joining any union during the term of the contract. *First Legal Support Services, LLC,* 342 NLRB 350, 362-3 (2004).

Respondent's memo of March 31 purported to disavow these yellow dog contracts. The Board has established the criteria necessary for an effective disavowal of unfair labor practices. In *Passavant Memorial Area Hospital*, 237 NLRB 138-9 (1978), the Board said:

> To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. (citations omitted)

I find that the memo of March 31 was not an effective repudiation of the violation engaged in by Respondent when it required employees to refrain from becoming members of any union during the term of the individual contracts. First, the memo was not timely. The contracts were first offered to employees in early February but the purported disavowal was not issued until the last day of March, about 7 weeks later.[53] Second, there is no proof in the record that the memo was adequately published to the employees involved, namely the employees who had signed the yellow dog contracts and who had attended the meetings where they were distributed. Neither Sieger nor Perles testified that the memo was given to those who had

[53] This was exactly the time period found untimely in *Passavant*.

actually signed the contracts. Further, Orlos' testimony established that employees were offered the contracts in closed door meetings. Presumably, not all the employees who attended the meetings eventually signed the contracts and some of these employees therefore went out on strike. Striking employees did not have access to the facility on March 31 or thereafter and they could not have seen the memo disavowing the requirement to abjure union membership. Finally, the Respondent engaged in proscribed conduct after publication of the purported repudiation on March 31; for the first three months of the strike, the employer's security guards unlawfully videotaped the striking employees on the picket line.

C. Violations of Section 8(a)(1)

1. August 2007 Staff Meeting: Impression of Surveillance and Threat

I credit Campbell that Sieger told the employees in August 2007 that she had heard they were going to strike. I credit Campbell that Sieger said if the strike were for three days it would be for three weeks because she had to go to an outside contractor for replacements. Sieger did not deny mentioning a strike at the meeting, and she acknowledged that she probably told the employees that she would have to give a four-week minimum guarantee to obtain replacement employees.

There is no evidence that during this period there had been any public discussion of a possible strike nor that the Union had distributed handbills mentioning a strike. The General Counsel argues that Sieger's statement gave the impression of surveillance of the employees' Union activity. The Board has found that an employer unlawfully creates an impression of surveillance where an owner tells an employee, "I know what you wanted to do, you want to do a work stoppage [or] a strike." *Tres Estrallas de Oro*, 329 NLRB 50 (1999). I find that Respondent violated Section 8(a)(1) when Sieger told the employees in August 2007 that she had heard they were going to strike.

The General Counsel argues that Sieger's statement that employees who struck for three days would have to stay out for three weeks was an unlawful threat to delay reinstatement. The General Counsel asserts that as early as August 2007 it was reasonable to assume that any strike would be an unfair labor practice strike.

The Board considered the issue of statements made to potential strikers in Judge Landow's case and held that whether Respondent's communication to the employees violated the Act or was protected by Section 8(c) hinges upon whether, given the circumstance at the time the statement was made, it was an accurate reflection of the employees' legal rights. 352 NLRB 6, 15. The prior case made no finding about the nature of a possible strike, and the Board decision was based on the inaccuracy of the Respondent's statement to the employees. When Kingsbridge told the employees in 2006 they would not be able to return to work for three weeks if they engaged in a three-day strike "Respondent had no firm plans to hire replacement employees for a three-week period." Even if the potential strike were an economic strike, the statement was inaccurate and was made when "Respondent lacked a substantial business justification" for its assertion.

In the instant case, Sieger's statement to the employees was made while Respondent was engaging in unfair labor practices. I have found above that Kingsbridge violated the Act beginning August 9 by denying the Union access to the facility, beginning August 3 by failing to provide necessary and relevant information to the Union and from August 9 failing to make required contributions to the Funds. The failure to pay the funds had been the subject of a prior unfair labor practice and Sieger had heard that the employees' medical benefits would be cut

off. At the August meeting, Sieger unlawfully bypassed the Union by offering employees $450 per month for medical benefits. It was therefore reasonable to expect that if the employees walked off the job they would be engaged in an unfair labor practice strike and entitled to immediate reinstatement upon an unconditional return to work. I find that Sieger's statement to employees that they would be denied immediate reinstatement upon ending a strike that would reasonably be anticipated to constitute an unfair labor practice strike violated Section 8(a)(1) of the Act. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006).

Even if I had not found Sieger's statement unlawful on the basis set forth above, I would find it unlawful because it did not accurately reflect the status of Respondent's dealings with the possible suppliers of striker replacements. Sieger told the employees that if they struck for three days "it will be for three weeks" because she had to go to an outside contractor for replacements. Sieger testified that in 2006 she had to commit to a minimum of four weeks for replacements from the Towne agency and she "probably" restated this in August 2007. Sieger did not explain why, if she had to provide a four-week guarantee, she told the employees they could not return for three weeks. This inconsistency leads me to conclude that Sieger had no firm basis for telling the employees that she knew the length of the guarantee she would have to provide in the event of a strike.

Griesman testified herein that Towne did not have a written contract with Kingsbridge and the four-week guarantee was not in writing. Griesman said he reiterated the four-week guarantee to Sieger "before the strike", but he did not state in what month or year this took place. Significantly, Griesman did not tell Sieger how much she would have to pay for the replacements. It is clear that in August 2007 Sieger had no enforceable contract with Towne because there was no agreement on the terms under which Towne would supply strike replacement employees to Kingsbridge. Further, Griesman did not know how many workers he supplied to Respondent once the strike began in 2008 and he could not say whether other agencies had also supplied striker replacements.[54] There is no evidence about these other replacements and no evidence what terms the other agencies required Kingsbridge to fulfill. Sieger did not identify the agency or agencies which actually supplied the replacements when the employees struck in 2008.

In conclude that in August 2007 when Sieger told the employees they would not be allowed back to work for three weeks in the event of a strike Respondent had no business justification for this statement. *Kingsbridge Heights Rehabilitation Care Center*, 352 NLRB 6, 17 (2008).

2. Videotaping of Union Meetings and Picketing

I credit Wray-Roach that on October 18, 2007, while she and Union Executive Vice President Rifkin met with employees on the street in front of the facility to discuss the termination of employee benefits and the strike vote, she observed Tony Szereszewski videotaping the crowd from the roof of the building.

I credit Wray-Roach and employees Toma Beica and Elizabeth Browne that during the informational picketing on November 28, and December 18 and 22, 2007, the pickets were filmed variously from inside patient rooms, from the lobby of the facility and from the facility's parking lot. Those operating the cameras were accompanied by Administrator Korzeb and

[54] I note that in preparation for a possible 2006 strike, Sieger contacted at least three agencies to replace the approximately 250 unit employees. 352 NLRB 6, 9.

employee Hubacek. I credit Wray-Roach and employee witnesses Julian Marut, Wladyslaw Chichon, Noeller Worrell, Wojciech Orlos and Pansy Shaw that during the first three months of the strike, uniformed security guards stood in front of the facility and filmed the striking employees as they manned the picket lines.

In *F.W. Woolworth Co.*, 310 NLRB 1197 (1993), the Board set forth the principles governing the videotaping of employees' concerted activities. An employer's "mere observation" of open and public union activity does not constitute unlawful surveillance. However, "Photographing and videotaping clearly constitute more than 'mere observation' because such pictorial recordkeeping tends to create fear among employees of future reprisals." An employer may photograph employees with proper justification such as a showing that it reasonably anticipated misconduct by the employees engaged in the union activity. Absent such balancing justification, videotaping unlawfully tends to interfere with the employees' rights to engage in concerted activities.

The record before me contains no such showing that Respondent reasonably anticipated that the employees gathered in front of the facility would engage in misconduct. There was no testimony from any official of Respondent that the fear of misconduct led to the videotaping of employees in October, November and December of 2007 nor that there was any expectation of misconduct during the strike from February to August 2008. In fact, no instances of misconduct in front of the facility were shown to have taken place at any time relevant to the instant proceedings.

I find that Respondent violated Section 8 (a)(1) of the Act by videotaping employees engaged in meetings with Union officials and engaged in picketing in front of the facility.

3. Threats to Union Supporters

I credit Orlos' uncontradicted testimony that in October 2007 Szereszewski told him that he was first on Sieger's list to be fired. Similarly, I credit Orlos that on December 10, 2007 Szereszewski instructed him not to participate in picketing so as to avoid having problems with Sieger. I also credit Orlos that Szereszewski told him to avoid Union activity and be careful in doing his work. Szereszewski said that Orlos was one of the people who was to be fired. I find that Respondent violated Section 8(a)(1) of the act when it threatened Orlos with discharge and unspecified reprisals if he engaged in Union activity. *Hialeah Hospital*, 343 NLRB 391 (2004).

I credit Orlos that on January 1, 2008, on the same occasion when Sieger went through Orlos' possessions and read his Union documents, Sieger asked Orlos whether he liked his job. I credit Sieger that she told him if he did not like his work she could send him back to Poland because he did not like America. Sieger also told Orlos that he was getting paid too much. Sieger denied threatening to have Orlos deported, but I do not credit her. Sieger based her denial on the fact that Orlos had documents permitting him to work in the USA. However, there are many grounds besides lack of papers upon which deportation may be initiated. Further, I have concluded generally that Sieger is not a reliable witness. I find that Sieger threatened Orlos with deportation because he supported the Union. Respondent thus violated Section 8(a)(1) of the Act. *Teddi of California*, 338 NLRB 1032, 1037 (2003).

I credit Shaw's testimony that on January 4, 2008 Sieger asked her whether she had voted to strike. When Shaw replied that she had voted in favor of striking, Sieger told her she could be terminated. Respondent violated Section 8(a)(1) of the Act by threatening to terminate Shaw for participating in an unfair labor practice strike. *Pennant Foods*, 347 NLRB 460, 469 (2006).

I credit the testimony of Shaw, Browne and Orlos that on several occasions Sieger threatened them if they did not reveal who had posted the paper on the wall of Five-West. I find that on December 19 and 26, 2007 and January 4, 2008 Sieger threatened Shaw with termination or suspension because Shaw would not reveal who was responsible for the poster. I find that on December 26, 2007 Sieger threatened Browne with termination by asking her to be honest about the poster and asking Browne if she wanted her job. I credit Orlos that on December 18 Sieger warned him that it would be "too late" if she found another witness to inform her who was responsible for the poster. Respondent violated Section 8(a)(1) of the Act by threatening Shaw, Browne and Orlos with discipline if they did not reveal the Union activities of their co-workers. *CNP Mechanical, Inc*., 347 NLRB 160, 169-70 (2006).

4. Denial of Requests for Union Representation

NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), establishes an employee's right to union representation, on request, at an investigatory interview which the employee reasonably believes might result in his being disciplined. "*Weingarten* therefore requires an employer to evaluate an investigatory interview situation from an objective standpoint – i.e., whether an employee would reasonably believe that discipline might result from the interview." *Consolidated Edison*, 323 NLRB 910 (1997).

Sieger testified that she interviewed all the employees about the paper posted on Five-West and then she called back those employees who had seen the paper to give them warning notices. Sieger's testimony clearly establishes that the purpose of the initial interviews was to determine who had seen the poster so that those employees could be disciplined. Thus, the initial interviews were investigatory in nature.

As is discussed more fully below, the evidence shows that when each of the employees met with Sieger they could reasonably have believed that the interviews were investigatory and might result in discipline.[55] The denial of Union representation to three employees violated Section 8(a)(1) of the Act. *Consolidated Edison Co. of New York*, *supra*.

Sieger asked Shaw about the paper on December 18 following two earlier inquiries by to Shaw by the Assistant Director of Nursing and the Charge Nurse. When Shaw admitted that she had seen the paper Sieger told her that she should have reported the posting to higher authority. By the time Sieger interviewed Shaw again on December 19, 2007, it was clear to the employees that Respondent viewed the poster incident seriously. On December 19 Sieger pressed Shaw to disclose the author of the poster, telling Shaw that there was a "witness" and that Shaw was dishonestly denying knowledge about the posting. At this point, Shaw asked to obtain a Union delegate but Sieger refused her request and proceeded to threaten Shaw with suspension and termination. Shaw again asked for Union representation and Sieger again refused the request. I find that that Shaw could reasonably fear that her interview with Sieger might lead to discipline; Sieger was accusing her of dishonesty and threatening her with suspension and termination. Respondent violated Section 8 (a)(1) of the Act by denying Shaw's request for Union representation on December 19, 2007.

Shaw and Browne were called to Sieger's office on December 26; they went there taking with them Union delegate Kervin Campbell. Sieger did not permit Campbell to enter her office

[55] I credit the testimony of Shaw, Browne, Campbell and Orlos about their interviews with Sieger.

with Shaw.[56] Shaw could reasonably have believed that Sieger was going to question her again concerning the poster on Five-West and that the interview might lead to discipline. Indeed, on this occasion Sieger asked Shaw whether or not she wanted her job in a clear reference to Shaw's refusal to name the author of the poster. When Shaw did not give Sieger a name, Sieger told Shaw she was terminated for telling a lie.[57] This meeting was part of Sieger's investigation into the poster incident; Sieger threatened Shaw in her continuing effort to obtain information about the Five-West posting. By refusing the Union delegate admission to the office when Sieger interviewed Shaw on December 26, 2007 Respondent violated Section 8 (a)(1) of the Act.

Browne had also been asked about the poster by Sacramed and had denied knowledge of its author. Browne met with Sieger on December 18 and she was questioned about who had put the paper on the wall. When she said she did not know, Sieger told her she was responsible for taking it down. Browne and Shaw were called to Sieger's office after December 26. Browne testified that Sieger would not permit Campbell to represent her on that occasion.[58] I find that Browne could reasonably have concluded that the meeting with Sieger might lead to discipline. Browne had twice been questioned by management about the poster and had failed to comply with demands that she identify the person responsible. Browne had every reason to believe that she was being recalled to meet with Sieger as part of Respondent's investigation and that she might be disciplined if she failed to give Sieger the answer to her question. Indeed, on this occasion Sieger asked Browne if she wanted her job and then told her to "be honest" and disclose the name of the person who had posted the paper on the wall. Sieger was clearly threatening Browne with loss of her job in an effort to further her investigation into the poster incident. Respondent violated Section 8(a)(1) of the Act by denying Browne Union representation on December 26, 2007.

When Orlos was called to Sieger's office on December 18, 2007 he had already been questioned about the poster by Sacramed and he had been asked by the head nurse for a written statement about the poster. At the meeting with Sieger, Orlos asked for a witness but Sieger denied his request. Orlos could reasonably have concluded that he was being interviewed as part of an investigation and, because Respondent was clearly intent on finding the author of the poster, Orlos could reasonably have concluded that he might be disciplined as a result of the meeting. Indeed, Sieger tried to get Orlos to admit knowledge of the poster and she warned him that if she found a witness "it could be too late." By refusing Orlos' request for Union representation Respondent violated Section 8(a)(1) of the Act.

5. Maintenance of the Visual Harassment Rule

In *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the Board set forth the analysis to be applied in cases where work rules allegedly violate the Section 7 rights of employees:

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[56] Campbell testified about this event which he also placed on December 26, 2007. Campbell told Sieger that Shaw and Browne had asked him to represent them but Sieger sent him away saying, "this is not a discipline." Sieger said they did not need a delegate.

[57] However, Shaw was not actually terminated until January 4, and she was fired for her purported connection to the letters written by Albert Spekman.

[58] Shaw and Campbell place this event on December 26, 2007 while Browne says it took place on January 2, 2008. I find that the interview took place on December 26, 2007. I do not find this discrepancy significant in the circumstances. I credit all three witnesses as to the material events of the day.

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. … [O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The General Counsel maintains that Respondent's visual harassment rule is unlawful because it can reasonably chill employees in the exercise of their Section 7 rights and because Respondent has applied it to restrict employees' exercise of those rights.

The visual harassment rule set forth in the employee handbook prohibits "derogatory or offensive documents, illustrations or pictures" and "derogatory or offensive posters, cartoons, publications or drawings." Respondent conducted training for its employees where they were told that the rule required them to report "anything that they see" … "if they feel or they think it would be a potential or offensive."

The rule prohibits any visual material that is "derogatory or offensive." This is a very broad term that would reasonably be interpreted by an employee to ban any criticism of management or of conditions in the workplace. Criticism of an employer is by its very nature derogatory. Of course, Section 7 protects the rights of employees to express just such criticisms. Additionally, employee criticism of the conditions of employment is often offensive to management. For example, an employee might reasonably conclude that criticizing management for the loss of medical benefits and for failing to sign a contract would likely be considered offensive to management. Therefore, a broad rule prohibiting any derogatory or offensive material is unlawful. *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. 916 F.2d 932 (4th Cir. 1990), "derogatory remarks may also include truthful union propaganda that places hospital personnel in an unfavorable light," 916 F.2d at 940. Accordingly, I find that Respondent unlawfully maintained a visual harassment rule that would reasonably tend to chill employees in the exercise of their section 7 rights.

I also find that the rule against derogatory or offensive visual material was applied in such a manner as to restrict the employees' Section 7 rights. The paper posted on December 18, 2007 near the nursing station on Five-West said that the employees were crying because Sieger was a liar, a robber, a traitor, a manipulator and a deceiver and it urged Sieger to "sign the contract." The circumstances leading up to this posting were that Respondent, under Sieger's ownership, unlawfully refused to sign the 2002 to 2005 contract, unlawfully failed to pay the employee benefit funds and unlawfully violated a settlement agreement requiring such payments. Then, Sieger again unlawfully failed to pay the employee benefit funds causing the employees to lose their medical coverage, Respondent unlawfully denied the Union access to the facility and Respondent unlawfully videotaped employee meetings and informational picketing. The Union had informed the employees that Sieger refused to sign a new collective-bargaining agreement and Sieger was discussing this matter with the employees and using unlawful threats and offering unlawful incentives to discourage employees from supporting the

Union. I note that in one Board decision Sieger's testimony had been discredited.[59] In this context, the poster amounted to concerted activity protesting management's actions and seeking to rally employees to the Union's position. In the circumstances, the poster was not so defamatory or opprobrious as to remove it from the protection of the Act. *KBO, Inc.*, 315 NLRB 570 (1994). [60]

By maintaining a visual harassment rule that reasonably tends to chill employees in the exercise of their Section 7 rights and by applying the rule to restrict its employee's exercise of Section 7 rights, Respondent violated section 8(a)(1) of the Act.

6. Coercive Interrogation of Employees

In evaluating whether employer interrogations about concerted activities violate the Act, the Board asks "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The Board evaluates "the background, the nature of information sought, the identity of the questioner, and the place and method of interrogation." Factors to be considered include a history of employer hostility to the Union and whether the questioning was neutral and non-threatening. 277 NLRB at 1218.

I credit Shaw's testimony about the occasions on which Sieger questioned her about protected concerted activities. On December 18, 2007 Shaw was called to Sieger's office where the latter asked Shaw if she had seen the paper posted on the wall on Five-West. On December 19, also in Sieger's office, Sieger asked Shaw who was responsible for the posting, and threatened to suspend or fire Shaw for failing to tell her who had put it up. On January 4, 2008 Sieger called Shaw to her office and asked her about Spekman's letter and whether Shaw had voted to strike. When Shaw said she had voted in favor of striking, Sieger told her she could be terminated. Sieger again asked Shaw the name of the person responsible for the poster on Five-West.

I credit Browne's testimony about being questioned in the conference room on December 18, 2007. I find that Sieger asked Browne who put the paper on the wall and Sieger repeatedly pressed her to identify this person while asking whether Browne wanted her job.

I credit Orlos' testimony that on December 18, 2007 Sieger questioned Orlos in her office, asking him if he had seen the paper and warning him that he should give her information because it would be too late once she had a witness.

All of these interrogations were conducted by Sieger, the owner of Respondent in her office or the conference room, two locations which lent formality to the proceedings. The facts of this case amply document Respondent's hostility to its employees' concerted and Union activities. Sieger was seeking information as to the identity of the person responsible for a poster that criticized her. Sieger threatened Shaw and Browne with termination if they did not answer her questions, and she warned Orlos that it would be "too late" to admit that he had posted the paper once she obtained another witness. Respondent violated Section 8(a)(1) of

[59] 352 NLRB at 11.

[60] I note that there is no testimony in the record that anyone other than employees had access to the particular area where the posting occurred. Respondent did not seek to show that the posting had the potential to disturb patients or other individuals.

the Act by coercively interrogating Shaw, Browne and Orlos about the poster on Five-West.

Further, Sieger asked Shaw whether she had voted to strike and then threatened that Shaw could be fired. In these circumstances, Respondent violated Section 8(a)(1) of the Act by asking Shaw whether she had voted to strike. *AM Property Holding Corp.*, 350 NLRB 998, 1042 (1007).

In December 2007 Szereszewski asked Beica whether he would go on strike. In February 2008, two weeks before the strike actually began, Dietary Director Dziekonski asked a number of employees whether they were planning to strike and he told them they must inform him of their intentions the next day. A health care institution that has received an 8(g) notice may lawfully ask its employees whether they intend to strike but it must observe certain safeguards to lessen the inherently coercive effect of the polling. The employer must explain fully the purpose of the questioning, it must assure the employees that no reprisals would be taken against them as a result of their response, and it must refrain from otherwise creating a coercive atmosphere. *Preterm, Inc.*, 240 NLRB 654, 656 (1979). Neither Szereszewski nor Dziekonski explained to the employees why they were asking whether they intended to strike and they did not give any assurance to the employees that no reprisals will be taken against them whether or not they decide to join the strike. Furthermore, Respondent created a coercive atmosphere by its many other unfair labor practices found herein. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their intention to join a strike.

7. Search of Orlos' Personal Belongings

I credit Orlos' uncontradicted testimony that on January 1, 2008 Sieger searched the contents of Orlos' bag and read documents relating to the Union that she found among his belongings. I credit Orlos that Sieger also directed him to read her a portion of these materials. I credit Orlos that Sieger searched his locker on that occasion. Orlos is a Union delegate and he had participated in the informational picketing in front of the facility. Further, Respondent had threatened to discharge Orlos for his Union activity. Respondent's search of Orlos' belongings created an unlawful impression of surveillance and violated Section 8 (a)(1) of the Act. *Hospital of the Good Samaritan*, 315 NLRB 794, 810 (1994).

D. Violations of Section 8(a)(3)

1. Discharge of Employees

The General Counsel asserts that Respondent violated Sections 8(a)(3) of the Act by disciplining and discharging Shaw, Browne, Orlos, Beica and Jolly in retaliation for their Union and protected activities and because Respondent believed they had engaged in such activity.

Pursuant to the *Wright Line* test, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must show that an alleged discriminatee engaged in protected activity, that the employer was aware of the employee's activity and sympathies, that the employer harbored animus toward the protected activity, and that the employee's protected activity was a motivating factor in the discipline or discharge of the employee. To avoid a finding that it violated Section 8(a)(3), the employer must show that it would have taken the same action against the employee even in the absence of the protected conduct.

Respondent's animus toward its employees' protected activities is well established. By the time Respondent discharged the five employees named above, Respondent had ceased providing the Union with access to the facility, it had videotaped its employees during the informational picketing, it had warned employees against striking and threatened not to reinstate strikers, it had threatened employees in connection with the poster on Five-West, it had interrogated employees about their protected and Union activities and it had denied employees their right to Union representation in disciplinary investigations.

Certain legal principles apply to the discipline of Shaw, Orlos and Browne discussed below. It is unlawful to discipline an employee for refusing to identify other employees who support the Union. *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458461 (2001). If a rule has been found to be unlawful, any discipline imposed pursuant to that rule is also unlawful. *Frazier Industrial Co.*, 328 NLRB 717, 718 (1999), enfd. 213 F.3d (D.C. cir. 2000).

a. Pansy Shaw

Shaw is a credible witness and I shall rely on her testimony, most of which is entirely uncontradicted. As I have found above, Sieger repeatedly and on three difference occasions pressed Shaw to disclose who had posted the paper found on Five-West on December 18, 2007. Sieger called Shaw dishonest and threatened her with suspension and discharge for failing to name the person who put the paper on the wall. It is clear that Sieger believed Shaw knew who had put the poster on the wall and Sieger wanted Shaw to disclose this employee's identify.

I credit Shaw that she did not communicate with Albert Spekman about the consequences to his mother of a possible strike at the facility. I credit Spekman that Shaw did not talk to him about a possible strike, did not warn him that his mother would not receive proper care and did not urge him to write letters about this eventuality. I credit Spekman that he did not identify to Sieger and Perles the employee who spoke to him about the strike and I credit Spekman that the employee was not in fact Shaw. Further, I find that Sieger and Perles were untruthful when they testified that Spekman identified Shaw as the employee who warned him about the effects on his mother of a possible strike. I conclude that Sieger and Perles believed that Shaw had spoken to Spekman and that they shaded their testimony accordingly.

I have found above that posting of the paper on the wall of Five-West constituted protected concerted activity and that the rule requiring employees to report the poster violated Section 8(a)(1) of the Act. Sieger testified that Shaw received a final warning on January 4, 2008 for failing to report the existence of the poster. Further, Sieger wanted Shaw to reveal the person responsible for the poster. The poster protested Sieger's unfair labor practices and urged her to sign the contract with the Union. Therefore, Shaw was warned because Respondent believed that she had exercised her right to engage in protected concerted activities by failing to report the poster and failing to disclose its author and because Shaw exercised her right to support the Union's position in the dispute with Respondent. Respondent violated Section 8(a)(3) of the Act by issuing Shaw a final warning on January 4, 2007.

Similarly, Shaw was discharged on January 4, 2008 because Sieger believed that she had spoken to Spekman about replacement workers during a possible strike and had urged him to write letters about it. It is clear that both Shaw and Spekman informed Sieger and Perles that this was not true, but Sieger did not let their denials change her determination to punish Shaw for Spekman's letters addressed to her and to the "Riverdale Press." Moreover, Sieger knew that Shaw had voted to strike and she therefore identified Shaw as a Union supporter. Indeed, when Sieger learned that Shaw had voted to strike she told Shaw that she could be terminated.

Respondent presented no evidence to show that it would have discharged Shaw in the absence of her support for the Union and if it did not believe that she had discussed a possible strike with Spekman and urged him to write letters about a strike. I conclude that Respondent discharged Shaw because she supported the Union and because Sieger believed that she had spoken about the strike with Spekman and had urged him to write letters about it. Respondent violated Section 8(a)(3) of the Act by discharging Shaw on January 4, 2008.

b. Wojciech Orlos

I credit Orlos that he had not seen the December 18 poster but that he had seen a poster with similar printing the day before. I credit Orlos that he so informed Sieger and I credit him that the poster he saw did not mention Sieger by name. I do not credit Sieger's testimony that Orlos told her he had seen a derogatory poster about her on December 17. I note that Sieger did not testify that she or any other agent of Respondent had seen the poster Orlos mentioned. Respondent was well aware of Orlos' Union activities; Orlos was a Union delegate. On January 1, 2008 Sieger unlawfully threatened to have Orlos deported and unlawfully searched his belongings and read his documents concerning the Union. I find that Respondent warned Orlos on January 4, 2008 and suspended him for two days because he supported the Union, because Respondent suspected him of knowledge concerning the December 18, 2007 poster on Five-West and because he did not report a poster he had seen on December 17, 2007. Respondent presented no evidence that it would have disciplined Orlos in the absence of his protected activity. Respondent violated Section 8(a)(3) of the Act by warning and suspending Orlos on January 4, 2008.

Orlos' testimony about the events of February 6, 2008 is uncontradicted. I credit Orlos that on that day tony Szereszewski assigned Orlos a special job that left him no time to complete his regular duties. I credit Orlos that Szereszewski then faulted Orlos for failing to complete his usual cleaning routine. Orlos received a written warning on February 7 for failing to follow procedures. Just before this incident, on January 28, Szereszewski had warned Orlos that he was on Sieger's list to be fired and had instructed him not to join the picketing and to avoid Union activity so that he would not have problems with Sieger. Given Respondent's repeated expressions of hostility to Orlos' protected activities and its warnings that Orlos should not support the Union at the peril of losing his job, I find that Respondent warned Orlos because he supported the Union. Szereszewski failed to appear at the instant hearing in response to General Counsel's subpoena and I have concluded that his testimony would not have been favorable to Respondent. I find that the alleged failure to complete his usual cleaning duties was a pretext used by Respondent to coerce Orlos in connection with his support for the Union. Respondent has not shown that it would have warned Orlos in the absence of his Union activity. Respondent violated of Section 8(a)(3) of the Act by warning Orlos on February 7, 2008.

c. Elizabeth Browne

I credit Browne that she picketed in front of the facility with the Union in November and December 2007. As discussed above, Respondent repeatedly videotaped the picketing and I find that Respondent was aware of Browne's support for the Union. I have found above that Sieger is not a reliable witness and I do not credit Sieger that she was unaware of Union activity by Browne. Sieger asked Browne about the paper found on the wall of Five-West on December 18, 2007. On two occasions Sieger repeatedly pressed Browne to identify the person responsible for the poster while asking whether she wanted her job. Sieger threatened Browne with termination for failing to report and remove the poster. On January 9, 2008 Browne was given a two day suspension for failing to report an offensive poster. I find that Respondent suspended Browne because she did not tell Sieger who put the poster on the wall and did not

report the poster and because Browne supported the Union. Respondent presented no evidence that it would have suspended Browne in the absence of her protected concerted activities. Respondent violated Section 8(a)(3) of the Act by suspending Browne on January 9, 2008.

I credit Browne that on January 31, 2008 she was in the day room preparing a meal for a patient named Frazier by cutting up his meat, buttering his bread and fixing his drink. I credit Browne that Frazier eats by himself and that she has never fed him. I credit Browne that she was expecting a call and holding her cell phone but that she put the phone in her pocket when she saw Sieger and Sacramed at the door of the day room. I credit Browne that she refused Sieger's request to have her picture taken, saying that she would first speak to her Union representative. I credit Browne that Sieger told her, "You work for me, not the Union." I credit Browne that on January 31 Sieger did not comment about Browne's cell phone or the patient. I credit Browne that most employees bring their cell phones to work.

I do not credit Sieger's testimony about Browne's conduct with respect to Frazier. First, Sieger's testimony was not consistent with the warning notice given to Browne on February 5, 2008 and Sieger's testimony changed dramatically each time she repeated her version of the events. The warning notice was for "standing while feeding the resident." However, Sieger's first recounting of the incident at the hearing has Browne "shoveling" food into the patient's mouth even though his mouth was full. This is a more egregious action than merely standing while feeding and, if it had actually happened, Sieger could not have failed to put this in the written warning notice. On cross-examination, Sieger's evidence was even stronger; she said that the patient was gagging on the food but that Browne continued to shovel food into his mouth. Sieger said this was outrageous, shocking and amounted to abuse. However, this shocking description was not placed on the warning notice. Second, Sieger's testimony is inconsistent with Sacramed's testimony. Sacramed stated that she saw Browne holding a spoon. She did not state that she witnessed Browne actually feeding Frazier; she concluded that Browne was feeding him because Browne was holding a spoon. For this very reason I do not credit Sacramed that she saw Browne feeding the patient. Sacramed only concluded that Browne must have been feeding Frazier because she saw a spoon; if she had actually witnessed feeding or gagging she could not have failed to remember that fact. I note that neither Sieger nor Sacramed testified to any personal knowledge of the patient or of his abilities. Thus, I find that the warning for standing while feeding a patient was not based on an actual observation by Respondent's witnesses.

As to the February 5 warning for using a cell phone while feeding a resident, I have found above that Browne was not actually feeding the patient and I have credited her testimony that she had her phone out because she was expecting a call but she was not speaking on the phone. Although there is a rule prohibiting employees from making or receiving personal calls during work hours, I find that this rule is not enforced. Browne stated that most employees bring their cell phones to work. Jolly testified that she and other employees, including licensed nurses, use their cell phones on the floor. Sieger testified that other employees have been disciplined for using cell phones while working, but no such disciplinary notices were produced by Respondent in response to the General Counsel's subpoena. I conclude that Respondent has not issued written warning notices to other employees who have used their cell phones during working hours.

The testimony concerning Browne's refusal to have her picture taken shows that when she declined Sieger's request for a photograph until she had spoken to the Union, Sieger expressed her hostility to this request by stating that Browne worked for her and not the Union. Sieger's testimony establishes that all the employees did finally consent to have their pictures

taken. Thus, the February 5 warning notice for insubordination based on Browne's initial refusal is incorrect. Moreover, Sieger testified that many employees refused to have their pictures taken but that all eventually complied with her request. Respondent did not show that any other employees were disciplined for initially refusing to have their pictures taken. As stated above, any disciplinary notices should have been produced in response to General Counsel's subpoena.

In summary, I find that Browne was not feeding a patient while standing, that she was not feeding a patient while using her cell phone and that she did agree to have her picture taken after an initial refusal based on her desire to consult the Union. I find that Browne did have her cell phone in her hand while she was preparing a patient's meal. I find that although many employees carry their cell phones at work Respondent has not issued written warnings to any other employees for holding their cell phones during work hours.

Respondent was aware of Browne's support for the Union because she picketed in front of the facility. Further, Respondent had threatened Browne for refusing to disclose who was responsible for the poster on Five-West and had expressed hostility to Browne's wish to consult the Union about her picture. I have found above that Browne was not standing and feeding a patient. The testimony of Sieger and Sacramed in support of the warning notice for feeding a patient while standing was not credible and I find that Respondent used it as a pretext for disciplining Browne. I find that the warning notice for using a cell phone while feeding a patient was false in that Browne was not feeding the patient and she was not talking on the phone, merely holding it in her hand. Thus, the use of a cell phone constituted a pretextual reason for disciplining Browne. Further, Browne established that other employees carry their cell phones on duty but Respondent has not shown that other employees were disciplined for this reason. Therefore, Respondent disparately disciplined Browne because she supported the Union. Finally, I find that the warning notice for refusing to have her picture taken was a pretext because Browne eventually agreed to a picture and none of the other employees who initially refused to have their pictures taken were issued warning notices by Respondent. Even if I had not found that the discipline for cell phone use and for refusal to take a picture was pretextual, I would have found a violation because Respondent has not shown that it would have disciplined Browne in the absence of her support for the Union. I find that Respondent violated section 8(a)(3) of the Act by warning and discharging Browne on February 5, 2008.

d. Toma Beica

I credit Beica's uncontradicted testimony that on December 18, 2007 he saw Szereszewski and a stranger filming the employees' informational picket line. Beica told Szereszewski it was not right to record the employees. In December 2007 and January 2008 Beica informed Szereszewski that he was willing to go on strike. Respondent was therefore aware that Beica supported the Union.

I credit Beica that he did not yell and curse at Szereszewski on January 23, 2008 and I credit him that he did not make any remarks about Sieger to Szereszewski. Because Szereszewski did not testify herein, I have concluded that his testimony would not have supported Respondent's position. Respondent issued a warning notice and termination to Beica because he "angrily yelled at [Szereszewski] and cursed [Sieger] and "used vulgar and extremely derogatory language in front of resident and other employees…." In connection with this incident, Perles testified that he interviewed "people on the floor" before he made the decision to terminate Beica. Since Respondent did not call any of these people as witnesses there was no direct testimony to support Perles' version of the event.

I have found that Beica did not yell or curse at Szereszewski and did not use derogatory language in front of residents and other employees. Therefore, I find that the notice and termination based on Beica's January 23 conversation with Szereszewski was a pretext. I find that Respondent warned and terminated Beica based on a pretext because Beica supported the Union. Respondent thus violated Section 8(a)(3) of the Act.

I credit Beica that on January 24, 2008 Peebles used an obscenity when Beica asked him to dust the floor after buffing it. I credit Beica that he did not curse or make racial remarks to Peebles; instead, I find that Beica told Peebles to cease cursing him and remarked that Peebles was young enough to be his son.

I do not credit Peebles' version of the January 24 events. Peebles testified that Beica told him to "fuck off" and that Beica often yelled and cursed at patients and cursed and screamed at the staff. Peebles testified that Beica had called Sieger an "asshole and bitch." Peebles' statement, written soon after the event he describes, does not support the testimony he gave. Peebles' written statement complains that Beica is harassing him by telling him how to do his work and by calling him "boy". Peebles' statement says nothing about cursing and screaming at him or at other staff members or at the patients, and it says nothing about any derogatory remarks concerning Sieger.[61] I conclude that Peebles' testimony is not truthful. I find that Beica did not direct any racial slurs at Peebles. It is clear that Peebles resented Beica telling him how to do his job and he viewed that as harassment. Peebles also resented Beica remonstrating with him by remarking that Peebles was young enough to be his son.

I note Sieger's testimony that an employee is interviewed before discipline is imposed. It is clear that Respondent did not ask Beica for his version of the events before warning and terminating Beica.

Respondent did not follow its stated procedure of investigating the matter before terminating Beica based on Peebles's complaint. Beica had worked for Respondent over nine years and had a clean disciplinary record; he had never before been accused of harassment. Peebles had worked at the facility from sometime in 2007, that is, less than one year. Respondent did not articulate any reason for believing Peebles and failing to ask Beica about the allegation. The discharge occurred just as the Union was getting ready to strike. Based on Respondent's well-established anti-Union animus, Respondent's knowledge of Beica's support for the Union, Respondent's failure to follow its procedure of investigating disciplinary matters and the timing of the discharge relating to the incident with Peebles, I find that Respondent seized on Peebles' complaint as a pretext to warn and discharge Beica. Respondent thus violated Section 8(a)(3) of the Act.

Even if I had not found that the incident with Peebles was a pretext I would find that Respondent would not have discharged Beica absent his support for the Union. Respondent did not present any evidence that it had ever disciplined other employees for the use of vulgar or racially insensitive language. Further, Szereszewski had warned Orlos not to engage in Union activity on pain of discharge and warned Orlos that he was next to be fired after Beica. These warnings establish Respondent's determination to discharge Union adherents, including Beica, whenever it could find an excuse to do so.

[61] In fact, these are the actions that are attributed to Beica in the purported encounter with Szereszewski.

e. Sheila Jolly

As described above, Sheila Jolly was a long service employee of Respondent with a history of favorable annual assessment forms. I find that Jolly was a visible supporter of the Union. She served on a Union committee and met openly and on a regular basis with Union representatives in front of the building during the months leading up to the strike.

I credit Jolly's testimony about the incident in the lobby on January 8, 2008. I find that Jolly and other employees on the night shift went to the lobby after work and that Jolly entered the nursing office to leave her name and request a meeting with Sieger. According to Sieger, right before the strike it was common for groups of employees to request a meeting with her in order to discuss the failure of Respondent to sign a contract with the Union. As the employees began signing out in the lobby, Jolly noticed receptionist Nadine Boyce staring at her. Jolly asked whether she was speaking to Sieger and Boyce refused to provide the information. Jolly asked Boyce to connect her with Sieger. Boyce became angry and waved her hand at Jolly. When Jolly asked why she was angry, Boyce slammed the phone down. Jolly was never interviewed by Respondent concerning this incident.[62]

Twenty one days later, Jolly was called to a meeting with Sieger following a midnight staff meeting. Sieger read a grievance prepared by Boyce; Jolly told Sieger the grievance was a lie. Nevertheless, Sieger gave Jolly a termination notice for gathering night staff around the receptionist, intimidating, yelling, pointing a finger, demanding that Boyce call Sieger and demanding a signed contract in a threatening tone. Although Jolly asked Sieger to question other witnesses who were present that morning, Sieger declined saying she had already investigated. Jolly was ejected from the facility at 2:30 am.

Sieger testified that she relied only on what she saw on the videotape in making her decision to fire Jolly. Respondent's failure to turn over the tape leads me to conclude that the tape would not support Sieger's description of what she saw on the tape. Based on Jolly's description of the event and based on the adverse inference I draw from Respondent's failure to produce the tape, I find that Jolly did not yell, point a finger, intimidate or use a threatening tone to Boyce and that she did not gather any employees around Boyce.

Jolly and the other night shift employees were engaged in concerted activity when they gathered in the lobby and when Jolly went into the nursing office to request a meeting with Sieger. Jolly was continuing the group's concerted activity when she asked Boyce to connect her with Sieger. Jolly was a visible Union supporter and committee member. Respondent has not shown that Jolly's conduct caused her to lose the protection of the Act; in fact, Respondent failed to present any competent evidence that Jolly engaged in any behavior other than asking to speak to Sieger. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). I find that Respondent violated Section 8(a)(3) of the Act when it discharged Jolly on January 29, 2008 because she engaged in Union activities.

2. Reimbursement of Union Dues

The reimbursement of dues for a 12 month period concededly was not tied to Sieger's purported mistaken belief that Respondent improperly deducted Union dues beginning with the expiration of the contract in April 2005 until Respondent ceased the deductions in October 2007.

[62] As described above, Sieger had earlier suspended Boyce for five days and threatened her with termination for admitting Union agent Wray-Roach into the building.

Sieger testified that she decided not to reimburse employees from the date the contract actually expired to the day when Respondent ceased making dues deductions, a period of 18 months, because "it's a lot of money." Instead, Respondent gave the employees the equivalent of 12 months of dues deductions. Thus, the sum returned to the employees was chosen arbitrarily. As stated above, Respondent was under no legal obligation to return the previously deducted dues which had been duly remitted to the Union until October 2007. The facts show that Respondent made a gift of a substantial sum, amounting to a 2% yearly wage increase, to its employees just when the employees learned that they were losing their medical benefits and when employees were meeting with the Union and deciding whether to strike. This was shortly after Respondent had ceased permitting Union access to the facility. And shortly before announcing the dues refund, Sieger had offered the employees $450 for medical coverage and had threatened to delay the reinstatement of unfair labor practice strikers.

The timing of the dues reimbursement and Respondent's manifest hostility to the Union activities of its employees compels the conclusion that Respondent provided the dues reimbursement in order to discourage its employees from supporting the Union. Respondent has provided no business justification for the dues reimbursement aside from Sieger's vague testimony that she was "advised" that she should not have continued to deduct and remit dues after the expiration of the contract. However, the purported advice was not legally correct and Respondent has not offered proof, aside from the testimony of a witness whom I have found to be unreliable, that this advice was in fact given to Sieger. Moreover, Respondent reimbursed only 2/3 of all the dues actually deducted and did not comply with the purported advice Sieger testified to. I find that Respondent has not shown that it would have reimbursed the dues in the absence of its employees' Union activities. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th cir. 1995). Respondent's reimbursement of Union dues was a violation of Section 8(a)(3) of the Act. *Yoshi's Japanese Restaurant*, 330 NLRB 1339, 1344-5 (2000).

Conclusions of Law

1. 1199 SEIU, United Healthcare Workers East, is the exclusive collective-bargaining representative of the employees of Respondent in the following appropriate unit

> All regular full and part-time employees including recreation employees and employees in the following classifications: certified nursing aide, dietary aide, laundry aide, housekeeping aide, maid, porter, head porter, housekeeper, gardener, fireman, handyman, maintenance, painter, window cleaner, engineer (licensed), kitchen aide, dishwasher, second cook, first cook, assistant chef, chef, telephone operator, receptionist, clerk, assistant dietician, dietician, recreation worker and aide, social worker aide, and social worker assistant, as supplemented by custom, usage and practice. Excluding professional, confidential employees and supervisory employees.

2. By denying the Union access to the facility, Respondent violated Section 8(a)(1)and (5) of the Act.

3. By failing and refusing to provide the Union with the information it requested relating to unit employees, including date of hire, department, shift, status, rate of pay and the monthly schedules, Respondent violated Section 8(a)(1) and (5) of the Act.

4. By failing and refusing to make required payments to the 1199/SEIU Greater New York Benefit Fund from August 9, 2007 through September 4, 2008, Respondent violated Section 8(a)(1) and (5) of the Act.

5. By failing and refusing to execute the collective-bargaining agreement reached on March 6, 2008, Respondent violated Section 8(a)(1) and (5) of the Act.

6. By failing and refusing to meet with the Union for the purposes of collective bargaining, Respondent violated Section 8(a)(1) and (5) of the Act.

7. By unilaterally granting employees a reimbursement of 12 months Union dues, Respondent violated Section 8(a)(1) and (5) of the Act.

8. By bypassing the Union, dealing directly with the employees and offering the employees individual contracts, Respondent violated Section 8(a)(1) and (5) of the Act.

9. By offering employees individual contracts which required them to refrain from becoming members of any union, Respondent violated Section 8(a)(1) of the Act.

10. By creating an impression of surveillance of its employees' Union activities and by searching their belongings to discover evidence of Union activity, Respondent violated Section 8(a)(1) of the Act.

11. By threatening to delay reinstatement of unfair labor practice strikers without proper justification, Respondent violated Section 8(a)(1) of the Act.

12. By videotaping employees engaged in meeting with Union officials and engaged in picketing, Respondent violated Section 8(a)(1) of the Act.

13. By threatening employees with discharge, deportation and unspecified reprisals because they supported the Union, or they voted to strike or they refused to reveal the Union activities of co-workers, Respondent violated Section 8(a)(1) of the Act.

14. By denying Union representation to employees who reasonably believed that their interviews could result in discipline, Respondent violated Section 8(a)(1) of the Act.

15. By maintaining a visual harassment rule that can reasonably be expected to chill employees in the exercise of their Section 7 rights and by applying the rule to restrict its employees' exercise of those rights, Respondent violated Section 8(a)(1) of the Act.

16. By coercively interrogating its employees about their Union activities and about whether they voted to strike, Respondent violated Section 8(a)(1) of the Act.

17. By warning and discharging Pansy Shaw because she would not disclose her co-workers' Union activities and because she supported the Union, Respondent violated section 8(a)(1) and (3) of the Act.

18. By warning and suspending Wojciech Orlos because he engaged in Union activities and because he would not disclose his co-workers' Union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

19. By warning, suspending and discharging Elizabeth Browne because she engaged in Union activities and because she would not disclose her co-workers' Union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

20. By warning and discharging Toma Beica because he engaged in Union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

21. By discharging Sheila Jolly because she engaged in Union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

22. By reimbursing its employees' Union dues for a period of 12 months, Respondent violated Section 8(a)(1) and (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having failed to execute the collective-bargaining agreement reached on March 6, 2008, it must be ordered to execute this agreement forthwith and to abide by its terms and conditions. To the extent that Respondent has failed to comply with the terms of the above-described agreement, Respondent must make its employees whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of that failure. All payments to employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as proscribed in *New Horizons for the Retarded, supra*. Also, to the extent that Respondent has failed to make payments to the 1199/SEIU Greater New York Benefit Fund, as described in detail below, it must make the Fund whole in the amounts required by the above-described agreement.

Respondent must remit all payments that it owes to 1199/SEIU Greater New York Benefit Fund for the period August 9, 2007 through September 4, 2008, with interest as provided in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and must make employees whole for any expenses they may have incurred as a result of Respondent's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980). All make whole payments to employees shall be made with interest as provided in *New Horizons for the Retarded*, *supra*.

During some of the months for which Respondent made no payments into the Funds some of Respondent's employees were on strike. Respondent was not required to make contributions to the Funds for the time that such employees were on strike. However, if some of Respondent's employees were not on strike or were on a leave of absence such employees would be entitled to contributions on their behalf as well as a make-whole remedy. *Titan Tire Co*., 333 NLRB 1156, 1165 (2001). These determinations are left to the compliance stage of the instant case. In addition, the period alleged in the complaint is covered, to some extent, by the Board's Decision in 353 NLRB No. 69, discussed above. This determination is also left to the compliance stage of the instant case.

The Respondent having maintained and applied an unlawful visual harassment rule in its handbook, it must be ordered to rescind the unlawful provision and republish the handbook

without the rule. As an alternative to republishing the handbook in its entirety, Respondent may supply the employees either with handbook inserts stating that the unlawful rule has been rescinded, or with a new and lawfully worded rule on adhesive backing which covers the old and unlawfully broad rule, unit it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rule must include the new insert before being distributed to employees. *Cintas Corp.*, 344 NLRB 943, fn. 4 (2005).

The Respondent having unlawfully offered individual contracts to employees it must cease giving effect to any individual contracts entered into with unit employees. However, Respondent shall not decrease any unit employee's wage rates or benefits as a result of this Decision.

Because the Respondent has a proclivity for violating the Act as found in the cases cited above at 340 NLRB 650 (2003), 352 NLRB 6 (2008) and 353 NLRB No. 69 (2008), and because of the serious nature of the violations and of the Respondent's widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I note that Respondent, despite being ordered to refrain from doing so in prior cases, has more than once refused to execute a collective-bargaining agreement, has more than once unlawfully videotaped its employees while they were engaged in concerted activities, has more than once unlawfully threatened to delay the return to work of unfair labor practice strikers and has violated a prior Board Order and a subsequent Settlement Agreement, repeatedly failing to make required payments to the employee benefit Funds. Further, the unfair labor practices found above show a determined effort on the part of Respondent to deprive its employees of their chosen Union through the use of threats, discipline, discharges, coercive interrogations, denials of Union representation, yellow dog contracts and direct dealing. *Planned Building Services*, 347 NLRB 670, 720 (2006); *United States Service Industries*, 324 NLRB 834, 838 (1997).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[63]

ORDER

The Respondent, Kingsbridge Heights Rehabilitation and Care Center, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying the 1199 SEIU, United Healthcare Workers East, access to the facility in accordance with the terms of the collective-bargaining agreement.

(b) Failing and refusing to make contributions to the 1199/SEIU Greater New York Benefit Fund, including the Benefit Fund (Health Care), the Child Care Fund, the Pension Fund, the Job Security Fund, the Education Fund and the Workers Participation Fund.

[63] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Failing and refusing to sign the collective-bargaining agreement that was agreed to between Respondent and the Union on March 6, 2008.

(d) Failing and refusing to meet with the Union for the purposes of collective bargaining.

(e) Unilaterally granting monetary benefits to unit employees.

(f) Bypassing the Union, dealing directly with the employees and offering employees individual contracts, including contracts that require them to refrain from becoming members of any union.

(g) Creating an impression of surveillance of its employees' union activities and searching their belongings to discover these activities.

(h) Videotaping its employees' union activities without proper justification.

(i) Threatening to delay the reinstatement of unfair labor practice strikers without justification if they make an unconditional offer to return to work.

(j) Threatening employees with discharge, deportation and unspecified reprisals because they support 1199 SEIU, United healthcare Workers East, or any other union, or because they vote to strike or because they refuse to reveal the union activities of other employees.

(k) Denying union representation to employees who reasonably believe that their interviews could result in discipline.

(l) Maintaining a visual harassment rule that can reasonably be expected to chill employees in the exercise of their Section 7 rights and applying the rule to restrict employees in the exercise of those rights.

(m) Coercively interrogating its employees about their union support or union activities.

(n) Disciplining, discharging or otherwise discriminating against any employee for supporting 1199 SEIU, United Healthcare Workers East, or any other union and because they refuse to disclose the union activities of other employees.

(o) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, grant the Union access to the facility in accordance with the collective-bargaining agreement.

(b) Provide the information requested by the Union.

(c) On request by the Union, execute the collective-bargaining agreement that was agreed to on March 6, 2008 and abide by its terms in accordance with the remedy section of this decision.

(d) Pay into the 1199/Greater New York Benefit Fund those contributions that it failed to make on behalf of its unit employees, in the manner set forth in the remedy section of this decision.

(e) Make whole the employees for any losses suffered by reason of its unlawful failure to make payments to the 1199/Greater New York Benefit Fund in the manner set forth in the remedy section of this decision.

(f) Make whole the employees for any losses suffered by reason of its unlawful failure to abide by the terms of the collective-bargaining agreement in the manner set forth in the remedy section of this decision.

(g) On request by the Union, meet for the purposes of collective bargaining.

(h) Cease giving effect to the individual contracts it unlawfully offered to its unit employees in the manner set forth in the remedy section of this decision.

(i) Rescind the unlawful visual harassment rule in the manner set forth in the remedy section of this decision.

(j) Within 14 days from the date of the Board's Order, offer Pansy Shaw, Elizabeth Browne, Toma Beica and Sheila Jolly full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(k) Make Pansy Shaw, Elizabeth Browne, Toma Beica and Sheila Jolly whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(l) Make Wojciech Orlos whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension in the manner set forth in the remedy section of the decision.

(m) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and the unlawful suspension, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and suspension will not be used against them in any way.

(n) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(o) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies in both English and Polish of the attached notice marked "Appendix."[64] Copies of the

[64] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 9, 2007.

(p) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 18, 2009

Eleanor MacDonald
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge, discipline or otherwise discriminate against any of you for supporting 1199 SEIU, United Healthcare Workers East, or any other union.

WE WILL NOT threaten to discharge or deport you because you support the Union, or any other union, or because you vote to strike.

WE WILL NOT engage in surveillance of you while engaged in union activities by videotaping such activity without proper justification and WE WILL NOT search your belongings to discover your union activities.

WE WILL NOT coercively question you about your union support or activities or the union activities of your co-workers.

WE WILL NOT refuse to permit the Union to represent you in an interview that you reasonably believe could result in discipline.

WE WILL NOT maintain a visual harassment rule that chills your exercise of the rights under Federal Law.

WE WILL NOT threaten to delay your reinstatement without justification if you participate in an unfair labor practice strike.

WE WILL NOT fail to make contributions to the 1199/SEIU Greater New York Benefit Fund.

WE WILL NOT refuse to sign the collective-bargaining agreement that was agreed to with the Union on March 6, 2008.

WE WILL NOT deny the Union the right of access to the facility.

WE WILL NOT refuse to meet with the Union for collective bargaining.

WE WILL NOT bypass the Union and deal directly with our employees, or and WE WILL NOT offer our employees individual contracts that require them to refrain from union membership.

WE WILL NOT unilaterally grant monetary benefits to our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Pansy Shaw, Elizabeth Browne, Toma Beica and Sheila Jolly full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Pansy Shaw, Elizabeth Browne, Toma Beica and Sheila Jolly whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make Wojciech Orlos whole for any loss of earnings and other benefits resulting from his suspension, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Pansy Shaw, Elizabeth Browne, Toma Beica and Sheila Jolly, and the unlawful suspension of Wojciech Orlos, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspension will not be used against them in any way.

WE WILL rescind the unlawful visual harassment rule from our handbook.

WE WILL on request by the Union, execute the collective-bargaining agreement that was agreed to on March 6, 2008.

WE WILL pay into the 1199/SEIU Greater New York Benefit Fund the contributions that we failed to make on our employees' behalf.

WE WILL make whole, with interest, the unit employees for any losses suffered as a result of our failure to make payments to the Fund.

WE WILL make whole, with interest, the unit employees for any losses suffered as a result of our failure to abide by the terms of the collective-bargaining agreement.

WE WILL on request, grant the Union access to the facility.

WE WILL provide the information requested by the Union.

WE WILL on request, meet with the Union for the purpose of collective bargaining.

WE WILL cease giving effect to the individual contracts we offered to unit employees, but we will not decrease the wages or benefits of any employee as a result of this action.

KINGSBRIDGE HEIGHTS REHABILITATION AND CARE CENTER

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.